Supreme Court, U.S.
FILED
051481 MAY 18 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

GARY M. ELDEN
JOHN E. BUCHEIT
GRIPPO & ELDEN LLC
111 S. Wacker Drive
Chicago, IL 60606
(312) 704-7700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ILEANA M. CIOBANU
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

May 18, 2006

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Sidley Austin LLP states that it is a partnership owned and operated by individual partners.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Statutory Background	4
B. *EEOC* v. *Waffle House*	6
C. The EEOC's Proceedings and District Court's Decision	7
D. The Decision Below	11
REASONS FOR GRANTING THE PETITION	12
I. THE DECISION BELOW IMPLICATES A WELL-ESTABLISHED CONFLICT AMONG THE FEDERAL COURTS OF APPEALS	13
A. There Is A Well-Established Conflict On The Issue Whether An Individual's Conduct Can Affect the EEOC's Ability To Obtain Monetary Relief For That Individual	13
B. This Case Directly Implicates The Circuit Conflict	18

TABLE OF CONTENTS—continued

Page

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT 20

III. THE COURT OF APPEALS WAS WRONG IN CONCLUDING THAT *WAFFLE HOUSE* HELD THAT THE EEOC IS NOT IN "PRIVITY" WITH THOSE INDIVIDUALS FOR WHOM IT SEEKS RELIEF 23

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Comer v. *Micor, Inc.*, 436 F.3d 1098 (9th Cir. 2006) 25
EEOC v. *Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) 14
EEOC v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) 6
EEOC v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987) 3, 6, 16
EEOC v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993) 10
EEOC v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), *abrogated by EEOC* v. *Waffle House, Inc.*, 534 U.S 279 (2002) 6
EEOC v. *McLean Trucking Co.*, 525 F.2d 1007 (6th Cir. 1975) 16
EEOC v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001) 10, 11, 16, 18, 19
EEOC v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 42 (2005) 2, 3, 17
EEOC v. *Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) 8
EEOC v. *TIC-The Indus. Co.*, No. 01-1776, 2002 WL 31654977 (E.D. La. Nov. 21, 2002) 17
EEOC v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) ..... *passim*
EEOC v. *W.H. Braum, Inc.*, 347 F.3d 1192 (10th Cir. 2003) 3, 15, 19
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) ..... *passim*
Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) 6, 20
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 20, 23, 26

TABLE OF AUTHORITIES—continued

Page

Haring v. *Prosise*, 462 U.S. 306 (1983) 25
Mohammed v. *May Dep't Stores, Co.*, 273 F. Supp. 2d 531 (D. Del. 2003) 17
Senich v. *American-Republican, Inc.*, 215 F.R.D. 40 (D. Conn. 2003) 18, 23
Vines v. *University of La.*, 398 F.3d 700 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006) 3, 13, 14, 19, 24

STATUTES AND REGULATIONS

29 U.S.C. § 621(b) 26
§ 626 ..... *passim*
§ 633(b) 5
29 C.F.R. § 1626.5 5
§ 1626.6 5
§ 1626.8(b) 5

RULE

Sup. Ct. R. 10 ..... 12, 13

SCHOLARLY AUTHORITIES

Federal Arbitration Act, 116 Harv. L. Rev. 382 (2002) 22
Robert Bass, *Tort Law—Employment Law—Rights of the EEOC*—EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002), 33 Cumb. L. Rev. 727 (2003) 20

TABLE OF AUTHORITIES—continued

Page

Janelle M. Fleming, *An Employment Arbitration Agreement Does Not Bar the Equal Employment Opportunity Commission from Seeking Victim-Specific Relief in a Suit Alleging a Violation of Title I of the Americans with Disabilities Act:* Equal Employment Opportunity Commission v. Waffle House, Inc., 41 Duq. L. Rev. 225 (2002) 25

J.P. Julienne, Case Note, *Employment Law—Binding Arbitration Agreements and Federal Remedies—Equal Employment Opportunity Commission Has the Ability To Pursue Victim-Specific Relief In Discrimination Actions for Employees Bound By Arbitration Agreements,* 70 Tenn. L. Rev. 583 (2003) 22

Jason A. McNiel, Note, *The Implications of* EEOC v. Waffle House: *Do Settlement and Waiver Agreements Affect the EEOC's Right To Seek and Obtain Victim-Specific Relief?*, 38 Ind. L. Rev. 761 (2005) 22

18A Wright, Miller & Cooper, *Federal Practice and Procedure* (2d ed. 2002) 25

OTHER AUTHORITIES

EEOC, *Age Discrimination in Employment Act (ADEA) Charges, FY 1992 through FY 2005, at* http://www.eeoc.gov/stats/adea.html (modified Jan. 27, 2006) 21

EEOC, *Charge Statistics, FY 1992 through FY 2005, at* http://www.eeoc.gov/stats/charges.html (modified Jan. 27, 2006) 21

TABLE OF AUTHORITIES—continued

Page

EEOC, *Filing a Charge of Employment Discrimination*, *at* http://www.eeoc.gov/charge/overview_charge_filing.html (modified Aug. 13, 2003) 5

EEOC, *Litigation Statistics, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/litigation.html (modified Apr. 13, 2006) 21

Letter from Paul Grossman to Deborah L. Hamilton (Dec. 20, 2001) 9

Letter from Deborah L. Hamilton to Paul Grossman (Dec. 27, 2001) 9

Letter from John P. Rowe to Sidley & Austin (July 5, 2000) 8

IN THE

Supreme Court of the United States

No. 05-

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sidley Austin LLP ("Sidley") respectfully seeks a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 437 F.3d 695 (7th Cir. 2006) (Pet. App. 1a-3a). The opinion of the United States District Court for the Northern District of Illinois is reported at 406 F. Supp. 2d 991 (N.D. Ill. 2005) (Pet. App. 4a-15a).

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2006. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Age Discrimination in Employment Act ("ADEA") are reproduced in the appendix to this petition at 16a-20a.

STATEMENT OF THE CASE

This case presents the issue of whether the conduct of individuals can affect the ability of the Equal Employment Opportunity Commission ("EEOC") to obtain relief on their behalf under the federal antidiscrimination laws.

In the decision below, the court of appeals held, based on its reading of this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), that the EEOC's ability to recover on behalf of individuals was "not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. As a result, the Seventh Circuit concluded that the EEOC could seek individual relief on behalf of a group of at least 32 lawyers who chose never to file charges with the EEOC—and thus who could not seek individual relief on their own behalf—because the court of appeals believed that the "doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

The court of appeals noted that its ruling was in accord with *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 42 (2005). Pet. App. 3a. There, the Eleventh Circuit held that the EEOC's "enforcement role is incompatible with a finding that its authority to bring an enforcement action is barred by a judgment in a private suit." *Pemco Aeroplex*, 383 F.3d at

1292. In doing so, the Eleventh Circuit concluded that "precedent . . . weighs heavily against finding privity between the EEOC and the private plaintiffs." *Id.* at 1294.

In stark contrast, other courts of appeals have held that the conduct of individuals can and should limit the relief sought by the EEOC because "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that places it in privity with those individuals." *Vines* v. *University of La.*, 398 F.3d 700, 707 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006). Indeed, in *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) (Alito, J.), the Third Circuit rejected the EEOC's argument that it was "not in privity with the individuals on whose behalf it maintains ADEA actions," *id.* at 496, and held that individuals who had litigated their "claims under the ADEA are precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims," *id.* at 496-97; see also *EEOC* v. *W.H. Braum, Inc.*, 347 F.3d 1192, 1201-02 (10th Cir. 2003) (explaining in a case under the Americans with Disabilities Act ("ADA") that "employee's conduct 'may have the effect of limiting the relief that the EEOC may obtain in Court'"); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (holding that EEOC in Title VII suit not permitted to seek back pay on behalf of individual "who has freely contracted away her right to back pay").

This conflict among the courts of appeals should be resolved by this Court. The extent to which an individual's litigation choices may limit the EEOC's ability to seek individual relief on his or her behalf is an important and recurring issue of federal law. Review and resolution of this conflict is particularly warranted because the EEOC is responsible for enforcing not just the ADEA, but other statutes including the Americans with Disabilities Act, Title VII of the Civil Rights Act and the Equal Pay Act. Thus, whether an individual's conduct can preclude the EEOC from

seeking individual relief is a significant and recurring issue under those statutes.

Contrary to the decision below, that issue was not resolved in *Waffle House*. Indeed, this Court expressly limited its ruling to the question "whether the fact that [the employee] has signed a mandatory arbitration agreement limits the remedies available to the EEOC." 534 U.S. at 297. In doing so, the Court reaffirmed that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in Court," *id.* at 296, and left "open" issues such as "whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek," *id.* at 297. In fact, the *Waffle House* Court took pains to reaffirm the continuing validity of cases such as *United States Steel Corp.* and *Goodyear Aerospace*, where the courts of appeals had held that the conduct of individuals limited the relief that could be sought by the EEOC on their behalf. *Id.* at 296-97.

In this case, the Seventh Circuit misread the decision in *Waffle House* by concluding that this Court held that the EEOC's right to seek recovery on behalf of an individual is in *all* circumstances "not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. That pivotal ruling poses the next logical question after *Waffle House*: When, if ever, can the EEOC obtain individual relief that would be barred if sought by the individual. That issue clearly warrants this Court's review.

A. Statutory Background.

Under the Age Discrimination in Employment Act ("ADEA"), an aggrieved individual may bring an action seeking legal or equitable relief based upon an alleged violation of the ADEA. 29 U.S.C. § 626(c)(1). The ADEA expressly recognizes that an employee unilaterally may knowingly and voluntarily waive his rights under the ADEA without EEOC approval. See *id.* § 626(f). The ADEA also

provides that "[n]o civil action may be commenced by an individual" unless that individual first has filed with the EEOC "a charge alleging unlawful discrimination" within 180 or 300 days "after the alleged unlawful practice occurred." *Id.* § 626(d).[1] By its terms, the ADEA thus prevents an individual from filing suit to recover individual relief if there has been no timely charge. *Id.*

The EEOC's regulations state that a "charge" "shall be in writing and shall name the prospective respondent and shall generally allege the discriminatory act(s)." 29 C.F.R. §1626.6; *id.* § 1626.8(b) ("charge is sufficient" if it "conforms to the requirements of § 1626.6"). A charge "may be submitted in person, by telephone, or by mail to any office of the Commission or to any designated representative of the Commission." *Id.* § 1626.5. As the EEOC acknowledges, "[a]ll laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court." EEOC, *Filing a Charge of Employment Discrimination*, *at* http://www.eeoc.gov/charge/overview_charge_filing.html (modified Aug. 13, 2003).

The EEOC also has authority to bring suit under the ADEA. If the EEOC sues to enforce an individual's rights, then the employee's ability "to bring such action shall terminate." *Id.* § 626(c)(1). Through this statutory scheme, "Congress intended for the EEOC to serve as an individual's representative when it seeks to enforce that individual's rights." *United States Steel Corp.*, 921 F.2d at 495. In all suits under the ADEA, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to

---

[1] Whether the charge must be filed within 180 or 300 days turns on whether state law also provides a remedy for discrimination based upon age. 29 U.S.C. § 626(d)(2); *id.* § 633(b). In this case, to be timely, charges by the 32 individuals would have to have been filed within 300 days after the fall of 1999.

effectuate the purposes of" the ADEA. See 29 U.S.C. § 626(b).

Moreover, this Court and others long ago recognized that the conduct of individuals can affect the relief that is appropriate for the EEOC to seek on their behalf. For example, in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 223-24 (1982), this Court held that an individual's failure to mitigate damages precludes full recovery of back pay. Similarly, in *United States Steel Corp.*, 921 F.2d at 496, the Third Circuit held that res judicata precludes the EEOC from obtaining individual relief in an ADEA suit after individuals have litigated the same claim in a private suit. And, in *Goodyear Aerospace Corp.*, 813 F.2d at 1542-43, the Ninth Circuit held that an employee's settlement with his employer rendered "moot" the EEOC's Title VII claim for back pay on behalf of the employee because "any recovery of back pay by the EEOC would go directly to [the employee] who has freely contracted away her right to back pay."

Finally, courts of appeals had divided over the extent that these principles should be extended to bar the EEOC from filing suit on an individual's behalf in federal court where that individual had signed an agreement to arbitrate. Compare, *e.g.*, *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that private agreement to arbitrate foreclosed EEOC suit seeking recovery on behalf of individual who had signed arbitration agreement), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that private agreement to arbitrate did not limit EEOC's authority to seek relief on individual's behalf).

B. *EEOC* v. *Waffle House.*

In *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), this Court granted certiorari to resolve the conflict among the courts of appeals on the narrow issue of whether the EEOC can obtain individual relief in federal court on behalf of an employee who had signed a mandatory arbitration agreement.

In that case, Eric Baker, an employee of Waffle House, signed an arbitration agreement that obligated him to resolve disputes relating to his employment by binding arbitration. *Id.* at 282. After he was discharged, Baker "file[d] a timely charge of discrimination with the EEOC alleging that his discharge violated the [Americans with Disabilities Act]." *Id.* at 283. The EEOC subsequently filed suit against Waffle House, seeking both injunctive relief and individual relief on Baker's behalf. *Id.* at 283-84. This Court explained that the "only issue before [it was] whether the fact that Baker ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." *Id.* at 297.

This Court held that the arbitration agreement did not limit the EEOC's ability to obtain individual relief on his behalf, explaining that the Federal Arbitration Act "does not purport to place any restriction on a nonparty's [EEOC's] choice of a judicial forum." *Id.* at 289. The Court did not seek to discard lower court precedent establishing that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296. To the contrary, the Court devoted Part V of its opinion to confirm its approval of decisions holding, for example, that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action." *Id.* at 297 (citing, with approval, *United States Steel Corp.*, 921 F.2d at 495 and *Goodyear Aerospace*, 813 F.2d at 1542). The Court recognized that in "several situations," the "EEOC does not stand in the employee's shoes," but it did not question that "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims." *Id.* at 297-98.

C. The EEOC's Proceedings and District Court's Decision.

In the fall of 1999, Sidley & Austin ("Sidley") decided, for performance reasons, to change the status of 32 equity partners in its law partnership. Under the ADEA, these individuals could not bring a lawsuit against Sidley unless

they first had filed a charge with the EEOC within 300 days of the challenged action. See 29 U.S.C. § 626(d)(2). Now, more than six years later, none of the 32 individuals has ever filed a charge with the EEOC alleging age discrimination or any other form of discrimination. What is at issue here is whether the EEOC may obtain individual damages on behalf of a group of individuals who chose not to seek that relief for themselves.[2]

In July 2000, the EEOC's District Director by letter notified Sidley that the EEOC was "investigating" Sidley "to determine its compliance status with the ADEA." Letter from John P. Rowe to Sidley & Austin at 1 (July 5, 2000) (Ex. A to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). In that letter, the EEOC included 29 requests for information. Sidley provided information informally but maintained that, as a bona fide partnership, the issue of "coverage"—whether the 32 partners were "employees" covered by the ADEA—should be decided before Sidley was required to turn over information on other topics. The EEOC disagreed, issued a subpoena and sought to enforce the subpoena in federal district court. See *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002).[3]

---

[2] Sidley also has defended against the EEOC's lawsuit because it has not engaged in any discrimination outlawed by the ADEA and because the 32 equity partners were not "employees," and thus were not covered by the ADEA.

[3] In that decision, the court of appeals ruled that "the district court was premature to order the subpoena complied with in its entirety" because "[w]ithout having proposed a standard or criterion to guide the determination, the Commission has not earned the right to force the law firm . . . to go on and produce the voluminous and sensitive documentation sought relating to the question whether, if these 32 partners were employees, they were demoted on account of their age." 315 F.3d at 707; *id.* at 711 (Easterbrook, J., concurring in part and in judgment) (stating that, "under the prevailing law of agency," "it is very likely that the 32 lawyers Sidley demoted would be classified as partners rather than employees").

During the proceedings about the enforcement of the EEOC's subpoena, Sidley asked the EEOC whether anyone had filed a "Charge of Discrimination" within the meaning of the ADEA. See Letter from Paul Grossman to Deborah L. Hamilton at 1-2 (Dec. 20, 2001) (Ex. B to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). On December 27, 2001, more than two years after the decision affecting the 32 partners, the EEOC confirmed that "[n]o partner or former partner of Sidley & Austin has yet filed a charge of discrimination." See Letter from Deborah L. Hamilton to Paul Grossman at 1 (Dec. 27, 2001) (Pet. App. 27a) (Ex. C to Sidley's Mot. for Partial Summ. J. on Claims for Individual Relief). Accordingly, there is no dispute that, under the ADEA, none of the 32 individuals can file suit to obtain relief under the ADEA. See 29 U.S.C. § 626(d) (requiring individual to file timely "charge" before the individual may bring a lawsuit).

On July 15, 2004, the EEOC's Chicago office issued a "determination letter" stating its view that there was reasonable cause to believe that Sidley had violated the ADEA. After efforts at settlement failed, the EEOC filed a complaint on January 2, 2005 in the United States District Court for the Northern District of Illinois alleging that Sidley had violated the ADEA. The Complaint is not limited to the events that arose in late 1999. Instead, according to the EEOC, "since at least 1978," Sidley has discriminated against an unspecified group of partners on account of their age. Complaint ("Compl.") ¶ 6(A) (Pet. App. 23a). The EEOC's Complaint seeks to enjoin Sidley "from engaging in any employment practice which discriminates on the basis of age against individuals 40 years of age and older." *Id.* ¶ A (Pet. App. 23a).

As relevant here, Sidley does not contend that the failure of the 32 individuals to file charges under the ADEA prevents the EEOC from seeking injunctive relief. What is at issue here is the individual relief sought by the EEOC. In its

Complaint, the EEOC seeks a judgment requiring Sidley "to make whole all individuals adversely affected by the unlawful practices described above, by providing . . . reinstatement and complete restoration of a class of employees over the age of 40 to the status of 'partner' which they, respectively, occupied previously, or in the alternative front pay, as well as, back pay, prejudgment interest, the value of lost benefits and liquidated damages." *Id.* ¶ C (Pet. App. 24a).

Soon after the EEOC filed its Complaint, in an effort to reduce and simplify the issues to be litigated, Sidley and the EEOC agreed that the parties would benefit from an early decision on the following question of law that fundamentally affects the scope and nature of this case: Whether the EEOC may recover individual-specific relief where, as here, no individual filed a timely charge of discrimination. Under then-existing Seventh Circuit precedent, the failure of the 32 individuals to file charges with the EEOC constituted a complete bar to the EEOC's recovery of individual relief on their behalf. See *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607, 619-20 (7th Cir. 2001); see also *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993).

In *North Gibson*, the Seventh Circuit relied upon the Third Circuit's decision in *United States Steel Corp.* to hold that the EEOC cannot seek damages on behalf of individuals who have failed to file timely charges of discrimination with the EEOC. 266 F.3d at 614-15. In *United States Steel Corp.*, the Third Circuit had held that the EEOC could not recover individual relief on behalf of individuals who had already litigated their claims on their own behalf. 921 F.2d at 496-97. The *North Gibson* Court reasoned that if any of the individuals who had failed to file timely charges had initiated a lawsuit, it necessarily would have been dismissed "for a failure to comply with the statutory filing requirement." 266 F.3d at 616. Then, following the principles set forth in *United States Steel Corp.*, the prohibition "on the EEOC's

subsequent relitigation of the same claims would apply squarely." *Id.* at 617.

The EEOC opposed Sidley's motion, arguing that *Waffle House* had overruled *North Gibson*. The district court recognized that if *North Gibson* were still good law then the EEOC's request for individual relief would have been barred because there was no dispute that the 32 individuals had failed to file a charge. See Pet. App. 6a ("If there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred."). The district court nonetheless denied partial summary judgment because it concluded that this Court's decision in *Waffle House* had overruled *North Gibson*. *Id.* at 9a. Recognizing that, "[i]n the end, Sidley may be right about the survival of *North Gibson*," *id.* at 13a, the district court certified the legal issue presented here for immediate interlocutory review, *id.* at 15a.

D. The Decision Below.

The Seventh Circuit accepted Sidley's application for interlocutory review, but (without separate briefing and argument) affirmed the district court's decision denying summary judgment. The court of appeals agreed that its prior decision in *North Gibson* barred the EEOC from obtaining "monetary relief on behalf of individuals" who had "failed to file timely administrative charges under the ADEA." Pet. App. 1a-2a. The court of appeals held, however, that *North Gibson* was "no longer good law" because it had been "scuttled by the Supreme Court in *EEOC* v. *Waffle House*." *Id.* at 2a. The Seventh Circuit observed that *Waffle House* held that the EEOC's claim for monetary relief under the ADA "was not barred by the fact that the victim had agreed to arbitrate any disputes arising out of his employment." *Id.*

The court of appeals ruled that *Waffle House* also held that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it seeks to make them

whole." Pet. App. 2a. Thus, the court below concluded that the EEOC was "not bound by the failure of the Sidley ex-partners to exhaust their remedies." *Id.* Although the court of appeals acknowledged that *Waffle House* reaffirmed that the conduct of an employee "'may have the effect of limiting the relief that the EEOC may obtain in court,'" *id.*, it ruled that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to resolve a conflict among the circuits over whether an individual's conduct can bar the EEOC from seeking individual relief under the ADEA and other antidiscrimination laws where such conduct would bar the individual from obtaining such relief.

First, review by this Court is appropriate because the decision below implicates a well-developed split among the circuits on this issue. See Sup. Ct. R. 10(a). The Fifth Circuit, as well as the Third, Ninth and Sixth Circuits, have held that conduct by an individual can and does limit the relief sought by the EEOC on that individual's behalf. Likewise, the Tenth Circuit has recognized that same rule in dicta. In contrast, the Seventh Circuit (in the decision below) and the Eleventh Circuit have rejected the conclusion that the EEOC is in "privity" with the individuals on whose behalf it seeks relief, and therefore have held that the recovery that the EEOC seeks is entirely independent of the legal rights of these individuals.

Second, this conflict concerns an important and recurring issue of federal law that has not been, but should be, decided by this Court. See Sup. Ct. R. 10(c). This Court did not purport to resolve that question when it decided *Waffle House*. 534 U.S. at 297 ("no question concerning the validity of his claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum

is presented by this record"). To the contrary, the Court went out of its way to reaffirm the continuing validity of cases holding that the conduct of individuals, in fact, does limit the relief obtained by the EEOC. *Id.* at 296-98.

Finally, the decision below is wrong because it cannot be reconciled with the ADEA or with the *Waffle House* decision upon which it purports to rely. See Sup. Ct. R. 10(a). Contrary to the decision below, *Waffle House* did not hold or suggest that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. To be sure, this Court identified "several situations in which the EEOC does not stand in the employee's shoes," 534 U.S. at 297, but it squarely confirmed that the conduct of private individuals "may have the effect of limiting the relief that the EEOC may obtain in court," *id.* at 296.

I. THE DECISION BELOW IMPLICATES A WELL-ESTABLISHED CONFLICT AMONG THE FEDERAL COURTS OF APPEALS.

A. There Is A Well-Established Conflict On The Issue Whether An Individual's Conduct Can Affect the EEOC's Ability To Obtain Monetary Relief For That Individual.

1. In *Vines* v. *University of Louisiana*, 398 F.3d 700 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006), the Fifth Circuit reviewed a district court decision holding that plaintiffs Vines and McGraw "were not bound by a federal court decision because they were not a party in that suit nor was there privity between the EEOC and the individual plaintiffs." *Id.* at 706. The district court ruled that the plaintiffs were not in privity with the EEOC because the action filed by the EEOC "was not prosecuted solely for the individual benefits of Vines and McGraw, but rather for the general public interest." *Id.*

On appeal, the Fifth Circuit reversed. It held that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that place[] it in privity with those individuals." *Id.* at 707. As such, the Fifth Circuit concluded that the EEOC is "in privity with individuals for whom it seeks relief such that a lawsuit litigated by either the EEOC or the individual bars subsequent relitigation of the same claims or issues." *Id.* at 708; *id.* at 709 (explaining this doctrine "applies equally regardless of the order of litigation").[4] Applying these principles, the *Vines* court ruled that the plaintiffs could not proceed with their age discrimination claims because their allegations were the same as those litigated previously by the EEOC. *Id.* at 710, 712. In doing so, the Fifth Circuit acknowledged this Court's decision in *Waffle House*, and concluded that it did not alter the law that "the ADEA gives the EEOC representative responsibilities when it seeks private benefits for an individual." *Id.* at 708 (internal quotation marks omitted).

The Fifth Circuit did not break new ground, but instead relied heavily on *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990). There, the Third Circuit, through then-Judge Alito, addressed whether "res judicata precludes an individual who has unsuccessfully sued an employer for age discrimination from obtaining individual relief in a later suit that is brought by the [EEOC] and that asserts the same claim." *Id.* at 490. Based upon an analysis of the statutory scheme, the Third Circuit ruled that the ADEA gives the "EEOC representative responsibilities when it seeks private benefits for an individual and that the doctrine of representative claim preclusion must therefore be applied." *Id.* at 495 ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable"). As

---

[4] In *EEOC* v. *Cosmair, Inc.*, the Fifth Circuit similarly explained that, under the ADEA, "an employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf." 821 F.2d 1085, 1091 (5th Cir. 1987).

relevant here, the court of appeals considered and rejected the EEOC's argument that it was not "in privity with the individuals on whose behalf it maintains ADEA actions because Congress intended the Commission to protect 'a broader independent public interest different from that of an individual grievant.'" *Id.* at 496. Instead, the Third Circuit held that the individuals were "precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 496-97.

In doing so, the Third Circuit acknowledged that the EEOC "has the responsibility to protect a vital public interest that transcends the interests of any or all aggrieved individuals," but that these "responsibilities *include* the representation of grievants when it seeks individual relief on their behalf." *Id.* at 496. And, when the EEOC "seeks individualized benefits under the ADEA for particular grievants, . . . the Commission functions to that extent as their representative." *Id.*

Consistent with these decisions, the Tenth Circuit too has acknowledged, in a case arising out of the ADA, that an individual's conduct may have the effect of precluding the EEOC from pursuing individual-specific relief. *W.H. Braum, Inc.*, 347 F.3d at 1201. In *W.H. Braum*, the court of appeals recognized that "[a]n aggrieved employee's conduct 'may have the effect of limiting the relief that the EEOC may obtain in court.'" *Id.* (quoting *Waffle House*, 534 U.S. at 296). Ultimately, the Tenth Circuit ruled that res judicata did not apply under the facts of that case. It did so not because the EEOC and plaintiff were not in privity, but because the defendant had "failed to show any conduct" on the part of the plaintiff that "in any way limits the relief the EEOC may seek." *Id.* at 1201-02 ("because there is no basis for time-barring Ms. Willis, there is no basis for arguing the EEOC is derivatively time-barred").

Similarly, in *EEOC* v. *Goodyear Aerospace Corp.*, the Ninth Circuit held that an employee's settlement with his employer precluded the EEOC from seeking back pay on the

employee's behalf. 813 F.2d at 1542-43. The Ninth Circuit acknowledged the EEOC's argument that a "back pay award advances the public interest in deterring the employer from illegal discrimination," but the court ruled that "the public interest in a back pay award is minimal" because "any recovery of back pay by the EEOC would go directly to [the employee] who has freely contracted away her right to back pay." *Id.* at 1543. Accordingly, the Ninth Circuit concluded that the EEOC's "claim for back pay on [the employee's] behalf is moot." *Id.*

Finally, in *EEOC* v. *McLean Trucking Co.*, the Sixth Circuit held that the conduct of an individual could limit the ability of the EEOC to recover on his behalf. 525 F.2d 1007, 1011 (6th Cir. 1975). There, the court of appeals considered whether an individual's "compromise settlement" of his earlier private action barred the EEOC from "recover[ing] any 'private benefit', such as back pay," on his behalf. *Id.* at 1011. The court of appeals held that the individual could not recover "additional benefits" relating to his individual circumstances because he "[was] bound by the settlement which he made and which was approved by the court." *Id.* at 1010.

2. In stark contrast, in the decision below, the court of appeals held that the failure of the 32 individuals to file timely charges with the EEOC did not preclude the EEOC from seeking individual relief on their behalf. Pet. App. 2a-3a. The court of appeals acknowledged that this conclusion was contrary to its prior ruling in *EEOC* v. *North Gibson School Corp.*, 266 F.3d 607 (7th Cir. 2001), but the court below concluded that *North Gibson* was "no longer good law," because it "was scuttled by the Supreme Court in [*Waffle House*]." Pet. App. 2a. The court of appeals read *Waffle House* to say that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole" and therefore the EEOC "is not bound by the failure of the Sidley ex-partners to exhaust

their remedies." *Id.* Indeed, the court of appeals concluded that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

Further, the court of appeals recognized and cited with approval a decision from another circuit court in a "related context[]." Pet App. 3a (citing *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004)). In *Pemco Aeroplex*, the Eleventh Circuit addressed the question whether an adverse judgment in an earlier suit brought by private individuals would bar the EEOC from bringing a later suit on the same grounds. 383 F.3d at 1285. In that case, the EEOC sought both injunctive relief as well as "monetary compensation" for each of the defendants' covered employees. *Id.* at 1283.

In deciding whether the lawsuit could proceed, the Eleventh Circuit explained that "before the doctrines of either res judicata or collateral estoppel may be asserted against a party, it must be established that the party in the second action was either a party in the previous action or a *privy* of the party in that action." *Id.* at 1285 (explaining that collateral estoppel requires a showing that the parties are "in privity") (emphasis added). After reviewing the relevant case law, the court of appeals held that the EEOC was not bound by the prior private lawsuit because "the district court clearly erred in finding privity between the EEOC and the [private] plaintiffs." *Id.* at 1294.

In sum, there is a well-developed conflict among the courts of appeals on the issue of whether conduct by an individual can bar the EEOC from seeking recovery on their behalf.[5]

---

[5] District courts post-*Waffle House* likewise reflect the conflict among the courts of appeals. *Compare Mohammed* v. *May Dep't Stores, Co.*, 273 F. Supp. 2d 531, 537 (D. Del. 2003) (finding that the EEOC and plaintiff "were in privity and that Defendant has satisfied its burden of establishing the three elements of claim preclusion"), *and EEOC* v. *TIC-The Indus.*

B. This Case Directly Implicates The Circuit Conflict.

As discussed above, the conflict among the courts of appeals turns on the question of whether the EEOC and the private individuals upon whose behalf it seeks relief are in "privity" such that the conduct of one can serve to limit the relief sought by the other. If the Seventh Circuit applied the standards set forth in decisions by the Fifth, Third, Tenth, Ninth, and Sixth Circuits, then it would not have reached the outcome that it did in this case. As a result, this case presents an ideal vehicle to resolve that circuit conflict.

In the decision below, the court of appeals recognized that its holding depended on the conclusion that *Waffle House* changed preexisting law in that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. Indeed, the court of appeals acknowledged that it previously had reached the opposite result on the "identical question" in the *North Gibson* case before this Court decided *Waffle House*. *Id.* at 2a.[6]

In *North Gibson*, the Seventh Circuit held that the EEOC could not seek damages under the ADEA on behalf of seven individuals who had failed to file timely charges of discrimination with the EEOC. 266 F.3d at 616-17. There, the EEOC sought to recover both individual and injunctive relief for five individuals who had never filed any charge with the EEOC and for two others whose EEOC charges were

---

Co., No. 01-1776, 2002 WL 31654977, at *3 (E.D. La. Nov. 21, 2002) ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable") (internal quotation marks omitted) (omission in original), *with Senich* v. *American-Republican, Inc.*, 215 F.R.D. 40, 46 (D. Conn. 2003) ("*Waffle House* can be read to end the limitation on the EEOC to seek victim-specific relief on behalf of employees who sign a waiver or release").

[6] The district court also agreed that, if *North Gibson* remained good law, then "the individual relief sought by the EEOC in this case would certainly be barred." Pet. App. 6a.

untimely. *Id.* at 614, 616. Relying on *United States Steel Corp.*, the Seventh Circuit concluded that the EEOC could seek injunctive relief, but could not obtain individual monetary relief for employees who had failed to file timely charges. 266 F.3d at 616. The court reasoned that, under the ADEA, "*the EEOC is in privity with the [individual employees], and it represents their interests in this claim for monetary relief.*" *Id.* (emphasis added). As a result, the *North Gibson* court explained that if any of the individuals had initiated a lawsuit, that lawsuit necessarily would have been dismissed because of their "failure to comply with the statutory filing requirement," *id.* at 616-17, and then the prohibition "on the EEOC's subsequent relitigation of the same claims would apply squarely," *id.* at 617.

Those are precisely the facts presented in this case. In the decision below, all that has changed since the Seventh Circuit's ruling in *North Gibson* is that court's subsequent conclusion that *North Gibson* was "scuttled" by this Court's decision in *Waffle House*. Pet. App. 2a. That is, the decision below turns on the court of appeals' conclusion that now, under *Waffle House*, "the EEOC is not in privity with the victims for whom it seeks relief." *Id.* at 3a.

That holding cannot be reconciled with the decisions of other courts of appeals that have concluded that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that place[] it in privity with those individuals." *Vines*, 398 F.3d at 707; see also *United States Steel Corp.*, 921 F.2d at 496 (rejecting argument that EEOC "is not in privity with the individuals on whose behalf it maintains ADEA actions"); *W.H. Braum*, 347 F.3d at 1201 (noting that conduct of individual can, in appropriate circumstances, limit the relief sought by the EEOC).

Simply put, resolution of the conflict among the courts of appeals is outcome determinative because, if the Seventh Circuit had applied, for example, the standards set forth in the

Fifth Circuit's decision in *Vines* or the Third Circuit's decision in *United States Steel Corp.*, then the EEOC would not have been permitted to seek individual relief on behalf of the 32 individuals who the record reflects did not file timely charges (or any charges) with the EEOC.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT.

The conflict in this case over whether the conduct by individuals can limit the EEOC's ability to obtain relief on behalf of those individuals raises an important and recurring issue of federal law that has not been, but should be, resolved by this Court. Indeed, the proper scope of the EEOC's responsibility under the ADEA and other antidiscrimination laws is a threshold issue for the implementation of these important congressional enactments.

First, the importance and recurrence of issues surrounding the EEOC's authority and limitations on that authority are confirmed by this Court's repeated efforts to ensure uniformity in the law with regard to the effect of conduct by an affected individual on the EEOC's inability to litigate. See, *e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (ruling that valid arbitration agreements "will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief"); *Ford Motor Co.*, 458 U.S. at 231-32 (ruling that employees who failed to mitigate their damages limited the EEOC's ability to obtain relief on their behalf); see also Robert Bass, Casenote, *Tort Law—Employment Law—Rights of the EEOC*—EEOC v. Waffle House, Inc., 122 S. Ct. 754 (2002), 33 Cumb. L. Rev. 727, 737 (2003) ("[T]he issue of EEOC rights has been heavily litigated since 1972.").

That conclusion is underscored by the scope of the EEOC's litigation and enforcement efforts. Over the last five years,

the EEOC has filed, on average, more than 400 lawsuits each year. See EEOC, *Litigation Statistics, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/litigation.html (modified on April 13, 2006). During that same five-year period, the EEOC states that it has recovered "monetary benefits" through litigation in excess of $500 million dollars. *Id.* Further, during that period, the EEOC has filed nearly 150 cases involving alleged violations of the ADEA. *Id.*

As substantial as these numbers are, they are dwarfed by the EEOC's pre-litigation enforcement efforts. In 2005, more than 75,000 charges were filed with the EEOC relating to the various statutes enforced by the EEOC. See EEOC, *Charge Statistics, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/charges.html (modified on Jan. 27, 2006).[7] In particular, 16,585 charges were filed pursuant to the ADEA, *id.*, and more than 14,000 age-discrimination charges were resolved separate and apart from the EEOC's litigation efforts. See EEOC, *Age Discrimination in Employment Act (ADEA) Charges, FY 1992 through FY 2005*, *at* http://www.eeoc.gov/stats/adea.html (modified on January 27, 2006).

Both the EEOC's litigation *and* enforcement activities would be affected by resolution of the question whether the conduct of individuals limits the EEOC's authority to seek and obtain relief on their behalf. Given the reach of the EEOC's enforcement and litigation authority, there can be no doubt that the issue of the scope of the EEOC's authority to obtain relief on behalf of individuals is an important and recurring issue that warrants this Court's review.

Second, this Court's decision in *Waffle House* did not purport to resolve the issue of whether an individual's conduct may limit the EEOC's ability to obtain compensatory

---

[7] More than 35 percent of the charges filed with the EEOC in 2005 involved claims of race discrimination; more than 30 percent involved claims of sex discrimination; and a full 22 percent involved claims of age discrimination. EEOC, *Charge Statistics, FY 1992 through FY 2005*.

relief in federal court. To the contrary, this Court was careful to limit the scope of its holding to "whether the fact that [the employee] ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." 534 U.S. at 297. In limiting its holding, this Court recognized that an "[employee's] conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296. And, in doing so, this Court cited with approval the Third Circuit's decision in *United States Steel Corp.* for the principle that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 297.[8] The holding in *United States Steel Corp.*, in turn, is based upon that court's rejection of the argument that the EEOC "is not in privity with the individuals on whose behalf it maintains ADEA actions." 921 F.2d at 496.

Third, despite the express limits on the holding in *Waffle House*, 534 U.S. at 297, the EEOC has sought, successfully, to expand its enforcement authority to encompass claims for

---

[8] *Compare* J.P. Julienne, Case Note, *Employment Law—Binding Arbitration Agreements and Federal Remedies—Equal Employment Opportunity Commission Has the Ability To Pursue Victim-Specific Relief In Discrimination Actions for Employees Bound By Arbitration Agreements*, 70 Tenn. L. Rev. 583, 602 (2003) (explaining that the *Waffle House* majority "narrowed its holding to the specific facts of the case in order to reconcile its seemingly contradictory support for court-imposed limitations on EEOC recovery as set forth in *Ford Motor Co.*, *Goodyear Aerospace Co.* and *United States Steel Corp.*"), *and Federal Arbitration Act*, 116 Harv. L. Rev. 382, 388 (2002) ("the Court's emphasis on the EEOC's exclusive control over discrimination charges is at odds with its discussion of the ways that employee conduct can affect the remedies the EEOC may seek, suggesting the potential for future decisions that may undermine the reasoning of this one"), *with* Jason A. McNiel, Note, *The Implications of* EEOC v. Waffle House: *Do Settlement and Waiver Agreements Affect the EEOC's Right To Seek and Obtain Victim-Specific Relief?*, 38 Ind. L. Rev. 761, 761 (2005) (concluding that *Waffle House* can be read to extend "to situations where an employee has previously settled or waived his or her claim").

individual relief on behalf of employees who "each had signed a valid waiver and release." *Senich* v. *American-Republican, Inc.*, 215 F.R.D. 40, 42 (D. Conn. 2003). Even though this Court in *Waffle House* recognized that an "employee's settlement 'render[s] her personal claims moot,'" 534 U.S. at 297 (internal citation omitted), the EEOC has argued successfully that *Waffle House* "'undermine[s] the reasoning' applied in the line of cases which have been interpreted to prohibit the EEOC from seeking victim-specific relief where an employee signs a waiver or release." *American-Republican*, 215 F.R.D. at 42, 46 (alteration in original). Such a position threatens to invalidate this Court's conclusion that disputes under the ADEA can be resolved "without any EEOC involvement." *Gilmer*, 500 U.S. at 28 ("nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes").

III. THE COURT OF APPEALS WAS WRONG IN CONCLUDING THAT *WAFFLE HOUSE* HELD THAT THE EEOC IS NOT IN "PRIVITY" WITH THOSE INDIVIDUALS FOR WHOM IT SEEKS RELIEF.

Certiorari also should be granted because the decision below was wrong in concluding that the "doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a.

First, this conclusion cannot be reconciled with the statutory structure of the ADEA. The right of any person to bring an action to enforce rights under the ADEA "shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under [the ADEA]." 29 U.S.C. § 626(c). As the Third Circuit has explained, "Congress would not have crafted this enforcement scheme—on the one hand, creating an individual cause of action, and on the other, cutting off the individual's right to sue once the EEOC begins its action—unless Congress intended for the EEOC to serve as the

individual's representative when it seeks to enforce the individual's rights." *United States Steel Corp.*, 921 F.2d at 494-95; *accord Vines*, 398 F.3d at 707. Given this structure, "the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable." *United States Steel Corp.*, 921 F.2d at 495.[9] The decision below nowhere considers this statutory structure or the conflicting circuit cases that have examined this statutory scheme.

Second, the court below incorrectly concluded that *Waffle House* "scuttled" preexisting law and held that the EEOC's "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a. *Waffle House* says nothing of the kind. To the contrary, as noted above, this Court carefully limited its ruling to the issue before it. Specifically, because there was "no question concerning the validity of [the employee's] claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum," the "only issue before the Court [was] whether the fact that [the employee] ha[d] signed a mandatory arbitration agreement limit[ed] the remedies available to the EEOC." *Waffle House*, 534 U.S. at 297. In resolving that issue, this Court confirmed that "[i]t is true" that the conduct of an employee "may have the effect of limiting the relief that the EEOC may obtain in court." *Id.* at 296 (citing cases).

Although this Court recognized "several situations" in which "the EEOC does not stand in the employee's shoes," *id.* at 297, that is a far cry from the court of appeals' conclusion that the EEOC's ability to recover "is not derivative of the legal rights of individuals even when it is seeking to

---

[9] *See also Vines*, 398 F.3d at 709 ("The doctrine of representative claim preclusion . . . applies equally regardless of the order of litigation."); *United States Steel Corp.*, 921 F.3d at 495 ("implicit" in "ADEA's enforcement scheme" is that "the doctrine of representative claim preclusion should apply symmetrically to those instances in which a private individual litigates first").

make them whole." Pet. App. 2a.[10] Indeed, if the Seventh Circuit were correct that the EEOC's rights do not depend on the "legal rights of individuals," then this Court was wrong when it concluded that the conduct of employees can "have the effect of limiting the relief that the EEOC may obtain in Court." 534 U.S. at 296.

Equally flawed is the court of appeals' conclusion that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. *Waffle House* made clear "that ordinary principles of res judicata . . . may apply to EEOC claims," 534 U.S. at 298, and cited with approval case law holding that "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims," *id.* at 297.

Under settled law, collateral estoppel and res judicata can apply only if there has been a showing that the same party or its privy was involved in the prior case. See, *e.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 317 n.10 (1983) (noting "traditional principle that collateral estoppel may only be asserted by persons who were either a party or privy to the prior action"); see also 18A Wright, Miller & Cooper, *Federal Practice and Procedure* § 4448, at 326 (2d ed. 2002) (same). The court of appeals' ruling forecloses such a showing in every case because, in the Seventh Circuit, the EEOC "is not in privity

---

[10] *See Comer* v. *Micor, Inc.*, 436 F.3d 1098, 1103 & n.9 (9th Cir. 2006) (stating that, under *Waffle House*, EEOC "was not suing in a wholly derivative capacity"); *see also* Janelle M. Fleming, *An Employment Arbitration Agreement Does Not Bar the Equal Employment Opportunity Commission from Seeking Victim-Specific Relief in a Suit Alleging a Violation of Title I of the Americans with Disabilities Act:* Equal Employment Opportunity Commission v. Waffle House, Inc., 41 Duq. L. Rev. 225, 238 (2002) ("In analyzing the battle between the power of the EEOC and the policy goals of the FAA, the Supreme Court's decision in *Waffle House* appears to follow its former line of reasoning: EEOC claims will *at times* receive special consideration.") (emphasis added).

with the victims for whom it seeks relief." Pet. App. 3a. Thus, the court of appeals' suggestion that a party still may not "take two bites from the same apple" ignores that the decision below authorizes both the EEOC and a private individual to seek the same relief because the lack of privity between them means that, as a matter of law, they will never be taking bites from the "same apple." *Id.*

Finally, the Seventh Circuit's conclusion that the EEOC's rights to recover against a defendant do not depend on the "legal rights of individuals even when [the EEOC] is seeking to make them whole," Pet. App. 2a, runs contrary to Congress's judgment that the ADEA should "help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). If the legal rights of individual employees have no effect on the relief that the EEOC may seek, Pet. App. 2a-3a, then there will be limited incentives for employers voluntarily to resolve disputes with individuals under the ADEA. As such, the ruling below maximizes the incentives for expensive and duplicative litigation in federal court.

But, as this Court has explained, Congress in the ADEA expressed its preference for a "flexible approach to resolution of claims" whereby such "disputes can be settled, for example, without any EEOC involvement." *Gilmer*, 500 U.S. at 28, 29; 29 U.S.C. § 626(d) (requiring the EEOC to engage in "informal methods of conciliation, conference, and persuasion"). In sum, the court of appeals' ruling conflicts with both the structure of the ADEA and this Court's decision in *Waffle House* and thereby provides an additional reason for further review by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY M. ELDEN
JOHN E. BUCHEIT
GRIPPO & ELDEN LLC
111 S. Wacker Drive
Chicago, IL 60606
(312) 704-7700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ILEANA M. CIOBANU
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

May 18, 2006

* Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-8002

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

SIDLEY AUSTIN LLP,
Defendant-Appellant.

Submitted Feb. 7, 2006
Decided Feb. 17, 2006

Before POSNER, EASTERBROOK, and WOOD, *Circuit Judges*.

POSNER, *Circuit Judge*.

In 1999, Sidley & Austin (as it then was) demoted 32 of its equity partners to "counsel" or "senior counsel." The EEOC began an investigation to determine whether the demotions might have violated the Age Discrimination in Employment Act. After we upheld the district court's rebuff of Sidley's effort to derail the investigation, *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir.2002), the Commission filed an ADEA suit against Sidley. Sidley asks us to entertain, as recommended by the district judge, an interlocutory appeal from the judge's denial of Sidley's motion for partial summary judgment. The appeal would require us to decide whether the judge was correct to rule that the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits. The ques-

tion satisfies the criteria in 28 U.S.C. § 1292(b) for an interlocutory appeal and since it has been fully briefed we can proceed to answer it.

The identical question received the opposite answer in *EEOC v. North Gibson School Corp.*, 266 F.3d 607 (7th Cir.2001), but that decision is no longer good law. It was scuttled by the Supreme Court in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002), which held that the EEOC's claim for monetary relief for a victim of an alleged violation of the Americans with Disabilities Act was not barred by the fact that the victim had agreed to arbitrate any disputes arising out of his employment. The reason there was no bar was not that the arbitration clause was unenforceable but that the Commission was not bound by it because its enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole. Similarly, the Commission is not bound by the failure of the Sidley ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust.

Sidley seeks to distinguish *Waffle House* from the present case on the basis of the following sentence in the Court's opinion: "It is true, as respondent and its *amici* have argued, that Baker's conduct [Baker was the victim of the alleged violation of the ADA] may have the effect of limiting the relief that the EEOC may obtain in court." 534 U.S. at 296, 122 S.Ct. 754. But the remainder of the paragraph makes clear that the Court was talking about something quite different from a procedural forfeiture. "If, for example, [Baker] had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. As we have noted, it 'goes without saying that the courts can and should preclude double recovery by an individual.'" *Id.* at 296-97, 122 S.Ct. 754 (citations omitted). Similarly, had Baker sued and lost, the employer might have been able to interpose the judgment as a bar to the

EEOC's obtaining money for Baker, by virtue of the doctrine of collateral estoppel. *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir.1990). Even though (this is the doctrinal heart of *Waffle House*) the EEOC is not in privity with the victims for whom it seeks relief, it does not follow that they must be permitted to take two bites from the same apple.

For all we know, some of the ex-partners may have received settlements from Sidley and others may have failed to mitigate their damages. Suppose all have received settlements that have fully compensated them for the alleged violations of the age discrimination law. Then the EEOC could obtain no monetary relief on their behalf. But this was not the basis for Sidley's motion for partial summary judgment. The basis was a ground that *Waffle House* rejects, as we and other courts have already recognized in related contexts. *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir.2005); *EEOC v. Board of Regents*, 288 F.3d 296, 300 (7th Cir.2002); *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1292-94 (11th Cir.2004), and cases cited there.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 05 C 0208

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD LLP.,
Defendant.

Dec. 20, 2005

MEMORANDUM OPINION AND ORDER

ZAGEL, *District Judge*.

In July 2000, the Equal Employment Opportunity Commission ("EEOC") opened a direct investigation into Defendant Sidley Austin Brown & Wood's ("Sidley") compliance with the Age Discrimination in Employment Act ("ADEA") in connection with a downgrading of 32 of its partners and a change in its mandatory retirement age. Specifically, Sidley told 32 partners that they had to either accept a downgrade in their status, from partner to counsel or senior counsel, or leave the firm. At the same time, Sidley lowered its mandatory retirement age from 65 to a sliding scale between 60-65.

The EEOC commenced its work after it was widely reported by the media in late 1999 that the status of Sidley's older partners had been changed to create more opportunities for younger lawyers at the firm, and after the EEOC received a confidential complaint from one of the affected partners.

On July 5, 2000, the EEOC notified Sidley of the investigation in a letter that included a designated charge number and was accompanied by a Request For Information. After receiving only partial responses from Sidley, the EEOC served it with a subpoena. This ultimately led to an enforcement action before Judge Lefkow and an appeal to the Seventh Circuit. After receiving documents provided in accordance with the courts' orders and after completion of its investigation, the EEOC issued a Letter of Determination finding reasonable cause to believe that Sidley had violated the ADEA by downgrading certain partners on account of their age and by maintaining a mandatory retirement age. On September 29, 2004, after conciliation discussions between the parties proved unsuccessful, the EEOC issued a Notice of Failure of Conciliation to Sidley, and filed this lawsuit on January 13, 2005, seeking monetary damages and injunctive relief.

Sidley is now seeking partial summary judgment on the EEOC's claims involving individual relief for the affected partners. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The question presented in Sidley's motion—whether the EEOC may pursue individual relief for persons who failed to file charges under the ADEA and are now barred from bringing their own individual suits—is a purely legal one, requiring that I determine whether *EEOC v. North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir.2001), was overruled by *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002).

In *North Gibson*, the Seventh Circuit held that the EEOC could not recover individual relief under the ADEA if none of the alleged victims had filed a timely charge of discrimination. 266 F.3d at 619-20. In that case, five of the seven

claimants represented by the EEOC had not filed ADEA charges, and the remaining two had made untimely filings. The *North Gibson* decision was based on the premise that when the EEOC pursues an individual claim under the ADEA, it "steps into the shoes of the individual" and becomes that individual's representative. *Id.* at 615. This privity, as the courts have put it, is created by the ADEA's distinctive enforcement scheme, wherein the right of the individual to bring an ADEA action is terminated upon the commencement of such an action by the EEOC. *Id.* The Court of Appeals reasoned that, because the EEOC was acting in a representative capacity, it should not be able to seek monetary relief on behalf of an individual who had no right to relief, as there were no "shoes" into which the EEOC could step. *Id.* Since each of the seven suits would have been procedurally barred, the Court of Appeals held that the EEOC could not seek monetary relief on behalf of those individuals. *Id.* at 616. In its opinion, the Court of Appeals explicitly differentiated the EEOC's right to seek such individual relief from the EEOC's right to seek injunctive relief, stating that "[w]hen the EEOC sues on its own behalf to obtain an injunction that prohibits discrimination, it promotes the public interest because its 'interests are broader than those of the individuals injured by discrimination.'" *Id.* (quoting *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir.1993)).

If there were no question concerning the ongoing validity of *North Gibson*, the individual relief sought by the EEOC in this case would certainly be barred. Here, the EEOC received a confidential request for an investigation but no ADEA charges. Since the time for such charges has long since expired, none of the 32 Sidley partners affected by the change in retirement policies would be entitled to seek relief from this or any other court, and I would be compelled to grant Sidley's motion.

A question about the validity of *North Gibson*, however, is raised by the Supreme Court's decision in *Waffle House*. In that case, the Supreme Court held that the EEOC could seek monetary relief for individuals whose claims were barred because each had signed a mandatory arbitration agreement with his or her employer. *Waffle House*, 534 U.S. at 295, 122 S.Ct. 754. The Court found that the Americans With Disabilities Act ("ADA") made "the EEOC the master of its own case" and "confer[red] on the agency the authority to evaluate the strength of the public interest at stake." *Id.* at 291, 122 S.Ct. 754. The Court further found that "it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." *Id.* at 291-92, 122 S.Ct. 754. The Court emphasized that the EEOC may seek "to vindicate a public interest . . . even when it pursues entirely victim-specific relief." *Id.* at 296, 122 S.Ct. 754. With this reasoning, the Court put an end to the distinction recognized in earlier cases, like *North Gibson*, between the EEOC's ability to seek individual monetary relief and its ability to seek injunctive relief. In this way, the Court makes it clear that the EEOC's right to bring suit seeking individual monetary relief goes beyond that of the individual and reaches the territory of public interest, thereby allowing the EEOC to seek relief for individuals, such as the affected Sidley partners in this case, who could not, for a variety of reasons, do so themselves.

Sidley, of course, argues that the *Waffle House* decision is applicable to only those cases in which the EEOC is seeking monetary relief on behalf of individuals who are subject to arbitration agreements.[1] This notion is dispelled by the

---

[1] Sidley also contends that *Waffle House* does not apply to the ADEA because its enforcement scheme is distinct from that of the ADA. I find this reading of *Waffle House* to be particularly strained in light of the Seventh Circuit's decision in *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296 (7th Cir.2002). As discussed herein, in *BOR*, the Court of

Seventh Circuit's decision in *EEOC v. Bd. of Regents of the Univ. of Wis.*, 288 F.3d 296 (7th Cir.2002). In *BOR*, the Court of Appeals applied the reasoning developed in *Waffle House* to a case involving sovereign immunity—an area of law wholly unrelated to arbitration agreements. In determining that the EEOC had an independent right to sue the state of Wisconsin (and therefore the Board of Regents of the University of Wisconsin), the Court of Appeals relied heavily on the language from *Waffle House* stating that the EEOC was "the master of its own case" and could seek "to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 300, 122 S.Ct. 754 (quoting *Waffle House*, 534 U.S. at 296, 122 S.Ct. 754). The Court of Appeals found that this reasoning forestalled any argument that the EEOC was merely "standing in the shoes of the individuals" or was "acting in privity with them as their representative." *Id.* at 299-300, 122 S.Ct. 754.

Yet, Sidley urges me to base my opinion on exactly the same kind of privity logic that failed to persuade the courts in *Waffle House* and *BOR*. Sidley argues that I should deny the EEOC the right to seek individual monetary relief on behalf of the affected Sidley partners because the partners them-

---

Appeals applied *Waffle House* to a case brought by the EEOC under the ADEA, clearly demonstrating that the rationale is applicable to ADEA cases. 288 F.3d at 300. The language in the *Waffle House* decision also indicates that it would be applicable to the ADEA. *Waffle House* discusses the province of the EEOC over discrimination cases during the first 180 days after a complaint is filed with the agency. The Court notes that during this 180-day period, the EEOC has full control of the complaint's litigation. *Waffle House*, 534 U.S. at 291, 122 S.Ct. 754. Within that period, an employee must obtain a right-to-sue letter before bringing a complaint in court and if, during that time, the EEOC decides to pursue its own suit, the individual has no independent cause of action. *Id.* This period creates an enforcement scheme much like that of the ADEA in which the EEOC's ADEA suit trumps any suit filed by an individual.

selves have no right to sue. I disagree. *Waffle House* makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right. I find it clear enough from the holdings in both *Waffle House* and *BOR* that the privity arguments seen in *North Gibson* are no longer applicable and that *Waffle House* does, in fact, overrule that decision.

In *BOR*, the Seventh Circuit did contemplate curtailing the EEOC's public interest based rights when there is another compelling, countervailing interest at issue. 288 F.3d at 300. As the Court notes, it would have to be more important than the right to arbitration or sovereign immunity. *Id.* Sidley contends that allowing the EEOC to seek monetary relief for individuals who are barred from doing so themselves, since they have failed to file charges within the statutorily allowed period, contravenes an employer's interest in a reasonably speedy resolution of discrimination claims, an interest which underlies all of our discrimination statutes. Sidley claims that allowing the EEOC to revive untimely claims obliterates the otherwise strictly enforced statutes of limitations associated with Title VII, ADA and ADEA cases. In the abstract, Sidley's argument does carry some weight, but in the context of this case it does not have much force. The EEOC began investigating Sidley's retirement practices approximately seven months after the changes to its policies, enacted in late 1999, were widely broadcast in the media and after receiving a confidential complaint. On July 5, 2000, the EEOC notified Sidley of the investigation with a letter that was accompanied by a document request. Over the next two years, the EEOC and Sidley battled over that document production. In July 2004, the EEOC completed its investigation and sent a Letter of Determination to Sidley stating that it had found reasonable cause to believe that Sidley's retirement policies violated the ADEA. After engaging in unsuccessful conciliation discussions, the EEOC filed this suit on January 13, 2005.

Throughout, these proceedings have been of great interest not only to Sidley, but also to most other large law firms across the country. It would be difficult for Sidley to argue that the EEOC's suit has come as a surprise, that the EEOC's claims concerning their new retirement policy are somehow stale, or that it had no reasonable opportunity for a speedy resolution of this matter. This is almost certainly why Sidley focuses on the possibility that the EEOC might bring their retirement policies dating back to 1978 into the suit. This argument, however, should really be directed toward determining the relevant class of individuals who may be properly represented by the EEOC in this suit. There may come a time when it is appropriate for me to set some temporal limits on the class of persons who may be represented in this case. But, that time is not now. The possibility that the individual claims of some partners affected by Sidley's longstanding retirement policies may be too remote for this case does not justify throwing out all the individual claims of partners affected by Sidley's newly implemented retirement plan. Accordingly, I find that concerns over bringing stale claims do not override the EEOC's right to advance the interests of the public by seeking individual relief for at least some individuals in this case.

Motion for Reconsideration and Certification for Interlocutory Review.

Sidley argues against my conclusion. It's two-part argument is worth consideration. The first reason Sidley gives for changing my decision is the rule that a District Court must follow the precedent of the Court of Appeals until the Court of Appeals specifically overrules that precedent. The Supreme Court has stated that all inferior courts must follow its clear precedent no matter how much its own later opinions have demolished the rationale for that precedent. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Doubts about

the reach of *Rodriguez* arose in the aftermath of the Supreme Court's evisceration of the sentencing guidelines in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). *See, e.g., United States v. Booker*, 375 F.3d 508 (7th Cir.2004) (majority and dissenting opinions). The doubts have been wiped away by the Court's comments in *Eberhart v. United States*, ___ U.S. ___, 126 S.Ct. 403, 407, 163 L.Ed.2d 14, 21 (2005).

Sidley cites two Seventh Circuit opinions setting forth my obligation to "follow the decisions of [the Seventh Circuit] whether or not [I] agree." *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir.2004). *See also, Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910 (7th Cir.1994) (must follow precedent not expressly overruled).

Donohoe is not the best case to illustrate this proposition, because it was deeply intertwined with the doctrine of law of that particular case and may have been concerned with the notion of a trial judge's ability to depart from an appellate opinion in the same case or, in military terms, to disobey the direct order of a superior. *Reiser* is a better case for Sidley but it does not carry the day. There, the District Judge had disregarded a Court of Appeals precedent construing state law for the reason that an Illinois Appellate Court had reached an opposite conclusion on the point. The Court of Appeals reasoning is instructive.

> A decision by a state's supreme court terminates the authoritative force of our decisions interpreting state law, for under *Erie* our task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications. They could in principle persuade us to reconsider and overrule our

> precedent; assuredly they do not themselves liberate district judges from the force of our decisions.

Reiser, 380 F.3d at 1029.

A proper reading of this language means that the District Judge *is* free to disregard circuit precedent that is contrary to the rule pronounced by the court possessing final authority to decide that particular question of law. Here, the Supreme Court of the United States has final authority to decide this particular question of law. If its decision conflicts with the circuit precedent, I would be ignoring the dictates of the "hierarchical system" in which we operate. A district judge should not wait for a signal from the Court of Appeals before following the Supreme Court's rulings.

I do not think Sidley argues to the contrary. Its argument is that I am not free to disregard circuit precedent on the grounds that it has been *implicitly* overruled. I agree that ignoring circuit precedent because the rationale for that precedent has been eroded to its vanishing point is problematic. Rationales are not holdings and, even when the stated rationale has been shredded, it does not mean that the holding may not be justified by a different rationale.

It is, though, sometimes difficult to decide whether a Supreme Court decision is an implicit overruling. There are few who would urge that a legal rule can only be voided by expressly stating the rule, citing the prior cases and announcing they are overruled. In my view the question to ask is whether the *holding* (not the rationale) of the Supreme Court can be squared with the *holding* (not the rationale) of the Court of Appeals—whether any real distinction between the two holdings can be found without the intellectual contortions commonly (and perhaps unfairly) attributed to John Duns Scotus.

I adhere to my decision. It was the holding of the Supreme Court that caused me to find that *North Gibson* did not con-

trol this case. The Court held it was the EEOC's province to vindicate a public interest by pursuing monetary damages for an individual even when the individual could not or did not make the claim themselves (subject to limitations not yet relevant here). The claim that *Waffle House* applied only to the cases where individuals were bound by arbitration agreements seems to me to be the sort of "rationale" based argument disapproved in earlier cases. What might be left of the defendant's argument is disapproved by the holding in *Board of Regents*.

Sidley's last remaining argument is that *North Gibson* is still good law because in *Waffle House*, the Supreme Court specifically tells us that *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3rd Cir.1990), is still good law. When mentioning that decision, the Court stated that, "[i]t is true . . . that [the employee's] conduct may have the effect of limiting the relief that the EEOC may obtain in court." *Waffle House*, 534 U.S. at 296, 122 S.Ct. 754. It then cited *U.S. Steel* as holding that, "individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims." *Id.* at 297, 122 S.Ct. 754. In considering both the context and language of the Supreme Court in discussing *U.S. Steel*, I do not read it as precluding the EEOC from proceeding to litigate on the merits of whether an individual merits relief. The Court's actual concern and reason for citing *U.S. Steel* is most clearly expressed in the last words of the relevant paragraph. "As we have noted, it 'goes without saying that the courts can and should preclude double recovery by an individual.'" *Id.* (internal citations omitted). In the end, Sidley may be right about the survival of *North Gibson*, but the Supreme Court's treatment of *U.S. Steel* is not persuasive on that point. Double recovery is not at issue in this case.

The request to certify the question for interlocutory review is more difficult to answer, and not because there is little

chance I could be wrong. Another judge of this Court has already reached the contrary conclusion, which shows that the issue is fairly contestable. It is a question of controlling law.

The standard at issue is whether early appellate resolution will speed up the litigation. *See Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir.2000). Sidley argues that the discovery process in this case would be vastly simplified if it did not have to deal with questions of individual relief. While this might ordinarily be true, it is untrue here. The case before me presents fairly novel claims whose resolution might significantly affect the way professional firms using partnership forms conduct their internal affairs. In other words, this is an important question for a broad range of institutions beyond the one which is litigating here. The problems to be addressed are described in *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 701-07 (7th Cir.2002).

The early judicial airing out of this issue generally, and in this case specifically, will require extensive discovery of how individuals were treated and why. Without a lot of detail, the merits of a broad legal theory rarely applied in this context will be difficult to discern. When the criteria for a decision are well established then less discovery will be required, or so I have noted in the cases before me.

The better argument for certification lies in the nature of the trial that would be conducted. If all that is at stake is injunctive relief, the volume of evidence that would need to be introduced would shrink. To show a pattern of age discrimination, the parties can rely on representative cases.[2] There will be no need to calculate the exact economic consequences for each individual. There will be fewer concerns

---

[2] I do not mean to suggest that this is the complete universe of evidence that may be needed. I refer only to the quantity of evidence required as to the individuals whose treatment by defendant is at issue.

with preserving the anonymity of the individuals said to be damaged by defendant—an interest that both sides recognize as valid. In short, to establish whether Sidley is covered under the ADEA and whether it violated the law would take far less trial and trial preparation time. So, too, would the determination, if the EEOC makes its case, of what forward looking remedies ought to be imposed on defendant. Early resolution of the viability of *North Gibson* would, in my judgment, speed up the litigation. This is especially true here because the discovery can be ongoing while the interlocutory appeal is heard. There will, therefore, be nothing to delay preparation for trial. A ruling in defendant's favor would speed the litigation.[3]

I grant the motion for certification and direct defendant to prepare for review by Court and the EEOC a proposed order containing the question or questions to be certified.

Defendant's Motion for Summary Judgment is DENIED initially and on reconsideration. Defendant's Motion of Certification for Interlocutory Appeal is GRANTED.

---

[3] Even if the defendant loses the appeal, a ruling might still slightly speed up the trial. It will spare the parties what I expect to be a long series of objections and arguments over the precise ambit of relevant evidence.

APPENDIX C

29 U.S.C. § 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discrim-

inatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective

defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Filed JAN 13, 2005]

Civil Action No. 05 C 0208

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff,

v.

SIDLEY AUSTIN BROWN & WOOD,
Defendant.

COMPLAINT
JURY DEMAND

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful employment practices on the basis of age and to provide appropriate relief to a class of attorney employees who were adversely affected by such practices. The Commission alleges that Defendant violated the ADEA by maintaining and implementing an age-based retirement policy and by downgrading or expelling a class of attorney employees age 40 years and older on account of their age in or about October 1999.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age

Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(b) (the "ADEA"), which incorporates by reference Sections 16(c) and 17 of the Fair Labor Standards Act of 1938 (the "FLSA"), as amended, 29 U.S.C. §§ 216(c) and 217.

PARTIES

2. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat. 2705.

3. At all relevant times, Defendant Sidley Austin Brown & Wood ("Defendant" or "Defendant Employer"), a Delaware limited liability partnership and its affiliates, which include an Illinois limited liability partnership, an English general partnership, and a New York general partnership, has been continuously doing business in the City of Chicago, State of Illinois, and has continuously had at least twenty (20) employees.

4. At all relevant times, Defendant has been an employer engaged in an industry affecting commerce within the meaning of Sections 11(b), (g) and (h) of the ADEA, 29 U.S.C. §§ 630(b), (g) and (h).

CONCILIATION

5. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices alleged below and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

STATEMENT OF CLAIMS

6. Defendant Employer has engaged in unlawful employment practices nationwide, in violation of Section 4(a) of the ADEA, 29 U.S.C. § 623(a):

(A) In maintaining and implementing, since at least 1978, an age-based retirement policy, Defendant Employer has discriminated against a class of attorney employees on account of their age in violation of the ADEA. The class of persons aggrieved includes Defendant Employer's attorney employees age 40 and older who were adversely affected by the retirement policy.

(B) Defendant Employer has discriminated against a class of attorney employees age 40 and older by downgrading or expelling them on account of their age in or about October 1999 in violation of the ADEA.

7. The effect of the practices complained of in paragraph 6 above has been to deprive a class of attorney employees age 40 and older of equal employment opportunities and otherwise adversely affect their status as employees, because of their age.

8. The unlawful employment practices complained of in paragraphs 6 and 7 above were and are willful within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Employer, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals 40 years of age and older.

B. Order Defendant Employer to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals 40 years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

C. Grant a judgment requiring Defendant Employer to make whole all individuals adversely affected by the unlawful practices described above, by providing the affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reinstatement and complete restoration of a class of employees over the age of 40 to the status of "partner" which they, respectively, occupied previously, or in the alternative front pay, as well as, back pay, prejudgement interest, the value of lost benefits and liquidated damages.

D. Grant such further relief as the Court deems necessary and proper in the public interest.

E. Award the Commission its costs of this action.

JURY TRIAL DEMAND

The Commission requests a jury trial on all questions of fact raised by the Complaint.

Respectfully submitted,

ERIE DREIBAND
General Counsel

JAMES LEE
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

Equal Employment Opportunity Commission
1801 "L" Street, N.W.
Washington, D.C. 20507

/s/ John C. Hendrickson
JOHN C. HENDRICKSON
Regional Attorney

/s/ Gregory Gochanour
GREGORY GOCHANOUR
Supervisory Trial Attorney

/s/ Deborah L. Hamilton
DEBORAH L. HAMILTON
LAURIE ELKIN
Trial Attorneys

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Chicago District Office
500 West Madison Street, Suite 2800
Chicago, Illinois 60661
(312) 353-7649

APPENDIX E

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Chicago District Office

[Received Dec. 29, 2001]

500 West Madison St., Suite 2800
Chicago, IL 60661
PH: (312) 353-2713
TDD: (312) 353-2421
ENFORCEMENT FAX: (312) 286-1163
LEGAL FAX: (312) 353-8255

December 27, 2001

BY FAX (213) 627-0705 AND U.S. MAIL
Paul Grossman
Paul, Hastings, Janofsky & Walker
555 S. Flower St., 23rd floor
Los Angeles, CA 90071

Re: Sidley Austin Investigation, No. 210-A03557

Dear Mr. Grossman,

This letter responds to your December 20, 2001 letter addressing the question whether a "Charge of Discrimination has been filed against Sidley."

As the EEOC's Memorandum in Support of Application for Order to Show Cause in Civ. No. 01C9635 explains, "Acting pursuant to its statutory authority, the Chicago District Office opened a *directed* investigation of Sidley's compliance with the Age Discrimination in Employment Act ('ADEA'), including but not limited to the 1999 partner demotions and reduction in the retirement age. See 29 C.F.R. 1626.4 (1991)." Memorandum at 4 (emphasis added). *See also* Declaration of Deputy District Director in Civ. No. 01C9635 at 2. ("Acting pursuant to its statutory mandate and

in accord with its regulations, the Chicago District Office opened a *directed* investigation into age discrimination at Sidley & Austin. See 29 C.F.R. 1626.4 (1991) (emphasis added)). No partner or former partner of Sidley & Austin has yet filed a charge of discrimination based on the 1999 partner demotions and changes in the retirement age, and nowhere in its pleadings in the subpoena enforcement action does the EEOC suggest that this has occurred.

From the beginning the EEOC has made clear that the EEOC's investigation of Sidley was proceeding pursuant to the EEOC's authority to conduct a directed investigation. The July 5, 2000 letter from the EEOC to Sidley & Austin opening the investigation indicates that the EEOC opened an "ADEA Directed Investigation" of Sidley & Austin, which was then assigned "EEOC Charge Number 210A03557." EEOC's references to the "Charge of Discrimination" cited in your December 20, 2000 letter thus refer to the charge number assigned to the directed investigation.

Because the EEOC pleadings to the Court in the current subpoena enforcement action and the EEOC's ongoing correspondence and communication with you make clear that EEOC is acting pursuant to its authority to conduct a directed investigation and not pursuant to any charge filed by any partner or former partner of Sidley & Austin, EEOC will file no clarifying document with the Court.

Sincerely,

/s/ Deborah L. Hamilton
DEBORAH L. HAMILTON
Trial Attorney

OPPOSITION BRIEF

(2)

Supreme Court, U.S.
FILED
JUL 21 2006
OFFICE OF THE CLERK

No. 05-1481

In the Supreme Court of the United States

SIDLEY AUSTIN LLP, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES L. LEE
Deputy General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

JENNIFER S. GOLDSTEIN
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may seek relief under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, for individuals who have not filed timely administrative complaints and therefore would be barred from bringing their own individual suits.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Constr. Co. v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372 (1893) 7
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 6
Donovan v. *University of Tex.*, 643 F.2d 1201 (5th Cir. 1981) 10
EEOC v. *American & Efird Mills, Inc.*, 964 F.2d 300 (4th Cir. 1992) 11
EEOC v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996) 10
EEOC v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001) 11
EEOC v. *Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) 4
EEOC v. *Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996) 11
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002) 4, 5, 10, 13
EEOC v. *U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) ... 11

Cases—Continued: Page

Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) 8
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 6
Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 9
Vines v. *University of La.*, 398 F.3d 700 (5th Cir. 2005), cert. denied, 126 S. Ct. 1019 (2006) 11, 12
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 6

Statutes and regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 1
29 U.S.C. 623 2
29 U.S.C. 626(a) 2, 8
29 U.S.C. 626(b) 2, 3, 8, 9
29 U.S.C. 626(c) 3
29 U.S.C. 626(d) 3, 9
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 10
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 2
29 U.S.C. 216(b) 8
29 U.S.C. 216(c) 8
29 U.S.C. 217 8
28 U.S.C. 1292(b) 5
29 C.F.R.:
Section 1626.4 8

Regulation—Continued: Page

Section 1626.13 8

Miscellaneous:

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 7

In the Supreme Court of the United States

No. 05-1481

SIDLEY AUSTIN LLP, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 437 F.3d 695. The opinion of the district court (Pet. App. 4a-15a) is reported at 406 F. Supp. 2d 991.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2006. The petition for a writ of certiorari was filed on May 18, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, makes it unlawful,

subject to certain exceptions, for an employer to discriminate in employment because of an individual's age. 29 U.S.C. 623. The ADEA gives the Equal Employment Opportunity Commission (EEOC) authority to investigate possible violations of the Act that is commensurate with the authority that the Secretary of Labor has with respect to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.* See 29 U.S.C. 626(a) (The EEOC "shall have the power to make investigations * * * in accordance with the powers and procedures provided in sections 209 and 211 of this title [sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended].").

The ADEA also gives the EEOC the authority to seek relief that is commensurate with the authority that the FLSA gives to the Secretary of Labor. 29 U.S.C. 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section."). In addition, the ADEA specifies that in an action brought by the EEOC to enforce the Act's prohibitions, "the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. 626(b).

The provision governing EEOC enforcement actions sets out only one requirement that the EEOC must satisfy before filing suit: "Before instituting any action under this section, the Equal Employment Opportunity

Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to initiate a civil action in any court of competent jurisdiction for legal or equitable relief. 29 U.S.C. 626(c). No such action may be commenced, however, "until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission." 29 U.S.C. 626(d). Furthermore, such a charge "shall be filed— (1) within 180 days after the alleged unlawful practice occurred; or (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred." 29 U.S.C. 626(d).

2. In the Fall of 1999, petitioner, a law firm, informed 32 partners that, in order to remain with the firm, they would have to accept a downgrade to "counsel" or "senior counsel." Pet. App. 4a. Simultaneously, petitioner changed its age-65 mandatory retirement policy to a policy under which partners were expected to retire some time between the ages of 60 and 65. *Ibid.* In late 1999, the media began reporting extensively on those events, characterizing them as an effort by petitioner to remove older partners in order to create more opportunities for younger lawyers at the firm. *Ibid.* During the same period, the EEOC received confidential information from one of the ex-partners who asked the EEOC to investigate petitioner's actions. *Ibid.*

In July 2000, the EEOC notified petitioner by letter that it was investigating the firm for possible violations of the ADEA. Pet. App. 9a. The letter specifically

stated that the EEOC was acting pursuant to its own independent authority to conduct a directed investigation, and not pursuant to any charges that had been filed by any partner or former partner at petitioner's firm. *Id.* at 26a-27a.

When petitioner declined the EEOC's request for certain documents, the EEOC issued a subpoena. Pet. App. 5a. Petitioner opposed the EEOC's effort to enforce the subpoena, arguing that none of its partners are covered employees within the meaning of the ADEA. The district court ordered the subpoena enforced, and the court of appeals affirmed to the extent that the documents sought information related to the coverage question. *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002).

3. After completing its investigation, the EEOC found reasonable cause to believe that petitioner had discriminated on the basis of age in violation of the ADEA. Pet. App. 5a. When efforts at conciliation failed, the EEOC filed suit in federal district court against petitioner, seeking both monetary damages and injunctive relief. *Ibid.*

In a motion for partial summary judgment, petitioner sought to preclude the EEOC from seeking victim-specific relief on the ground that none of the adversely affected partners had filed a timely charge. Pet. App. 5a. The district court denied petitioner's motion, holding that this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002), "makes clear that EEOC's ability to seek monetary relief on behalf of individuals is derived from its own statutory rights to advance the public's interest and is unrelated to any individual's right." Pet. App. 9a.

Petitioner sought reconsideration or, in the alternative, certification of the issue to the court of appeals pursuant to 28 U.S.C. 1292(b). Pet. App. 10a. The EEOC opposed both requests. The district court denied reconsideration, but agreed to certify the issue to the court of appeals. *Id.* at 10a-15a.

4. The court of appeals agreed to decide the certified question and affirmed. Pet. App. 1a-4a. The court framed the question presented as whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." *Id.* at 1a.

The court of appeals noted that a prior Seventh Circuit decision had held that the EEOC could not obtain relief in such circumstances. Pet. App. 2a. The court held, however, that its prior precedent could not be squared with this Court's subsequent decision in *EEOC* v. *Waffle House*, 534 U.S. 279 (2002). Pet. App. 2a. The court explained that in *Waffle House*, the Court held that an individual's decision to arbitrate his claim does not preclude the EEOC from seeking monetary relief on his behalf because the EEOC's enforcement authority "is not derivative of the legal rights of individuals even when it is seeking to make them whole." *Ibid.* Applying that analysis, the court of appeals concluded that "the Commission is not bound by the failure of [petitioner's] ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust." *Ibid.*

The court of appeals also rejected petitioner's reliance on the statement in *Waffle House* that an individual's conduct "may have the effect of limiting the relief that the EEOC may obtain in court." Pet. App. 2a (quoting *Waffle House*, 534 U.S. at 296). The court explained

that this Court was not referring to a "procedural forfeiture," but to an individual's failure to mitigate and his acceptance of a settlement. *Ibid.* The court also stated that when an individual sues and loses, the employer might be able "to interpose the judgment as a bar to the EEOC's obtaining money for [that individual], by virtue of the doctrine of collateral estoppel." *Id.* at 2a-3a. Because petitioner sought summary judgment based entirely on a ground that was inconsistent with *Waffle House*, however, the court of appeals held that the EEOC was free to seek monetary relief for petitioner's ex-partners. *Id.* at 3a.

ARGUMENT

The court of appeals held, on interlocutory appeal, that the EEOC may seek victim-specific relief for individuals who did not file age discrimination charges with the EEOC. Pet. App. 2a. The interlocutory nature of the ruling provides a sufficient basis to deny review. In any event, the court of appeals' holding is supported by the plain language of the ADEA and this Court's decisions, and it does not conflict with the decision of any other court of appeals. For that reason as well, further review is not warranted.

1. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of petition for writ of certiorari). The interlocutory nature of the order "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per

curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893) (Court generally should not review interlocutory order absent "extraordinary" circumstances); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some * * * unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

This case does not present any reason to depart from the general rule against review of interlocutory orders. To the contrary, this case is particularly ill-suited for immediate review by this Court. Discovery is proceeding in the district court, and resolution of the question presented by petitioner on the permissibility of make-whole relief will not affect the EEOC's ability to seek a determination of liability and appropriate injunctive relief. Should petitioner ultimately prevail on liability, the issue of the propriety of make-whole relief would become moot. Should the EEOC prevail on liability, petitioner will be able to raise any challenge to that determination in the court of appeals. And, if the court of appeals affirms, petitioner may then seek this Court's review on the propriety of make-whole relief, as well as on any other issue that petitioner chooses to raise at that time. See Pet. 8 n.2 (noting that petitioner has argued that its partners are not employees covered by the ADEA, and that the downgrading of 32 partners was performance-based). In those circumstances, there is no reason for the Court to deviate from its normal practice of denying review of interlocutory orders.

2. In any event, the court of appeals correctly held that an individual's failure to file a charge does not affect the EEOC's authority to seek relief for that individual, and that holding does not conflict with the decision of any other court of appeals. For that reason as well, review is not warranted.

a. Under the ADEA, the EEOC is explicitly empowered "to make investigations," whether or not it has received a charge of discrimination from an individual. 29 U.S.C. 626(a). As this Court has observed, "the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA 'from any source,' and it has independent authority to investigate age discrimination." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (citing 29 C.F.R. 1626.4, 1626.13); see 29 C.F.R. 1626.4 ("The Commission may, on its own initiative, conduct investigations of employers * * * pursuant to sections 6 and 7 of the Act."); 29 C.F.R. 1626.13 (Commission may continue investigation even after withdrawal of a charge "[b]ecause the Commission has independent investigative authority").

The ADEA also explicitly authorizes the EEOC to bring an action to recover monetary and injunctive relief for victims of discrimination. See 29 U.S.C 626(b) (incorporating 29 U.S.C. 216(b) and (c), 217), and separately providing that a court may award the EEOC victim-specific relief). The ADEA imposes only one precondition to an EEOC enforcement action—that the EEOC "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. 626(b).

In a separate provision, the ADEA gives individuals a right to file their own suit, but only if they first file an administrative charge within a specified number of days. 29 U.S.C. 626(d). By its terms, however, that administrative charge requirement affects only an individual's right to file his own ADEA action. It does not qualify the EEOC's separate authority to file its own suit and to seek relief for individual victims of discrimination. Thus, the text of the ADEA unambiguously gives the EEOC authority to seek relief for victims of discrimination regardless of whether those individuals have filed their own charges of discrimination.

That allocation of authority furthers the ADEA's purposes. Persons who are discrimination victims may be reluctant to file charges because of concerns about the consequences for their careers or for other legitimate reasons. In such situations, the Act allows the EEOC to determine whether it is in the public interest to seek relief for those persons.

b. This Court's decision in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), firmly supports the conclusion that the EEOC's authority to seek victim-specific relief is not dependent on an individual filing his own charge of discrimination. In that case, the Secretary of Labor sought minimum wages and overtime pay for workers who opposed application of the FLSA requirements to them. The Court upheld the Secretary's authority to seek such relief, explaining that "the purposes of the Act require that it be applied even to those who would decline its protections." *Id.* at 302. Because the ADEA incorporates the enforcement provision of the FLSA, 29 U.S.C. 626(b), that same principle governs the EEOC's authority to seek relief. And if the EEOC may seek relief for persons who ac-

tively oppose the EEOC's position, it may surely seek relief for persons who have simply chosen not to file charges.[1]

This Court's decision in *Waffle House* reinforces that conclusion. In that case, the Court held that the EEOC may seek victim-specific relief for individuals who have signed arbitration agreements. The Court explained that the text of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, "clearly makes the EEOC the master of its own case," and "it is the public agency's province—not that of the court—to determine whether public resources should be committed to the recovery of victim-specific relief." 534 U.S. at 291-292. The Court added that even when the EEOC seeks entirely victim-specific relief, it "may be seeking to vindicate a public interest," *id.* at 296, and the EEOC's claim for that relief is therefore not "merely derivative." *Id.* at 297.

The situation here is analogous. The text of the ADEA unambiguously gives the EEOC authority to seek victim-specific relief regardless of whether an individual files a charge, and the EEOC's request for such relief is designed to vindicate the public interest. The court of appeals therefore correctly held that an individual's failure to file a charge does not preclude the EEOC's request for victim-specific relief.

c. Three other circuits, while not addressing the precise question presented here, have recognized that the failure of an individual to file a charge does not preclude the EEOC from filing suit. In *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529, 1537 (1996), the Second Circuit held that "the EEOC may file suit where a charge was

[1] Should any discrimination victim refuse a monetary award, that money would be paid into the treasury. *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1208 n.16 (5th Cir. 1981).

not filed by the affected employee." In *EEOC* v. *American & Efird Mills, Inc.*, 964 F.2d 300, 303 (1992), the Fourth Circuit held that "[n]othing in the language of this title, or in the incorporated language of the other statutes, hinges EEOC authority on the filing of a valid employee charge." And in *EEOC* v. *Tire Kingdom, Inc.*, 80 F.3d 449, 451 (1996), the Eleventh Circuit held that "29 U.S.C. § 626(b) * * * grants the EEOC an independent right to bring suit to enforce the provisions of the ADEA, and that, "by its plain reading," the timely charge requirement, "does not apply to the EEOC." There is only one circuit decision that has ever applied the time limits for private individual actions to an EEOC action, and the court of appeals in this case overruled that decision. Pet. App. 2a (overruling *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)).

Petitioner contends (Pet. 13-15) that the decision below conflicts with the Fifth Circuit's decision in *Vines* v. *University of Louisiana*, 398 F.3d 700 (2005), cert. denied, 126 S. Ct. 1019 (2006), and the Third Circuit's decision in *EEOC* v. *United States Steel Corp.*, 921 F.2d 489 (1990). There is, however, no conflict.

In *Vines*, the Fifth Circuit held that when the EEOC seeks relief on behalf of individuals and loses, collateral estoppel bars those individuals from seeking relief on the same charges. 398 F.3d at 706-707. In *U.S. Steel*, the Third Circuit held that individuals who fully litigated their own claims are barred by res judicata from recovering relief in a subsequent EEOC action based on the same claims. 921 F.2d at 496-497. There is no conflict between those collateral estoppel and res judicata decisions and the decision below. Because there has been no prior action involving the claims raised by the EEOC in this case, the doctrines of collateral estoppel

and res judicata are inapplicable. Moreover, the court below expressly left open the possibility that collateral estoppel would bar an individual who sues and loses from obtaining relief in an EEOC action. Pet. App. 3a. At the same time, neither *Vines* nor *U.S. Steel* involved the distinct question whether an individual's failure to file a charge bars the EEOC from obtaining relief for that individual, and neither of those circuits has resolved that distinct issue. Petitioner's asserted conflict therefore does not exist.[2]

3. Rather than focusing on the question presented in this case, petitioner seeks to present the more general question "[w]hether conduct by individuals that bars them from obtaining individual relief under the federal antidiscrimination laws similarly bars the Equal Employment Opportunity Commission (EEOC) from obtaining individual relief on their behalf." Pet. (i). The sole question certified and resolved by the court of appeals, however, is the much narrower question whether "the EEOC may obtain monetary relief on behalf of individuals who, having failed to file timely administrative charges under the ADEA, are barred from bringing their own suits." Pet. App. 1a.

Furthermore, in holding that the EEOC may obtain relief for individuals who have not filed timely administrative charges, the court of appeals did not suggest that

---

[2] In *Vines*, the Court invited the views of the United States on whether certiorari should be granted. In its brief responding to that invitation, the United States argued that a judgment against the EEOC does not bar an individual from litigating his own ADEA claim. See Brief for the United States as Amicus Curiae at 6-12, *Vines*, *supra* (No. 04-1615). The United States nonetheless opposed review of that issue. *Id.* at 12-17. The Court denied a writ of certiorari. 126 S. Ct. 1019 (2006).

an individual's conduct could never affect the EEOC's ability to obtain relief for that individual, as petitioner's more general question implies. To the contrary, the court of appeals expressly recognized that under *Waffle House* and other cases, an individual's failure to mitigate and an individual's settlement of a claim *would* affect the EEOC's effort to obtain relief for that individual. Pet. App. 2a. And as discussed above, the court of appeals also left open the possibility that when an individual sues and loses, the EEOC may be foreclosed from obtaining relief for that individual. *Id.* at 3a.

At the same time, as *Waffle House* makes clear, "it simply does not follow from the cases holding that the employee's conduct may affect the EEOC's recovery that the EEOC's claim is merely derivative." 534 U.S. 297. The Court has recognized "several situations in which the EEOC does not stand in the employee's shoes," *ibid.*, including when the employees actively oppose relief, as in *Tony & Susan Alamo Foundation*, and when an employee agrees to arbitration, as in *Waffle House*. The court of appeals correctly concluded that an employee's failure to file a charge is another situation in which an employee's conduct does not affect the EEOC's authority to seek victim-specific relief.

Because the court of appeals resolved only the narrow question whether an individual's failure to file a timely charge affects the EEOC's authority to seek relief for that individual, because it correctly resolved that question, and because the court's interlocutory decision on that issue does not conflict with the decision of any other court of appeals, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JAMES L. LEE
Deputy General Counsel

CAROLYN L. WHEELER
Acting Associate General Counsel

JENNIFER S. GOLDSTEIN
Attorney
Equal Employment Opportunity Commission

JULY 2006

FILED
AUG 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1481

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

GARY M. ELDEN
JOHN E. BUCHEIT
GRIPPO & ELDEN LLC
111 S. Wacker Drive
Chicago, IL 60606
(312) 704-7700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ILEANA M. CIOBANU
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 1, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
ARGUMENT	3
I. THIS CASE SQUARELY IMPLICATES A CONFLICT AMONG THE CIRCUIT COURTS ON A RECURRING AND IMPORTANT ISSUE	3
II. THE PROCEDURAL POSTURE OF THIS CASE IS NO BAR TO REVIEW	6
III. THE EEOC'S ARGUMENTS CONCERNING THE MERITS CONFIRM THE NEED FOR REVIEW	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 7
EEOC v. *American & Efird Mills, Inc.*, 964 F.2d 300 (4th Cir. 1992)..... 6
EEOC v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996)..... 6
EEOC v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)..... 5
EEOC v. *Tire Kingdom, Inc.*, 80 F.3d 449 (11th Cir. 1996)..... 6
EEOC v. *U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990)..... 1, 4, 8
EEOC v. *Waffle House, Inc.*, 534 U.S. 279 (2002)..... 1, 2, 8, 9
General Tel. Co. of the Nw., Inc. v. *EEOC*, 446 U.S. 318 (1980)..... 6
Gilmer v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)..... 10
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916)..... 7
Haring v. *Prosise*, 462 U.S. 306 (1983)..... 5
Kraushaar v. *Flanigan*, 45 F.3d 1040 (7th Cir. 1995)..... 5
Lancaster v. *Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987)..... 10
Lehman v. *Nakshian*, 453 U.S. 156 (1981)..... 6
Lorillard v. *Pons*, 434 U.S. 575 (1978)..... 7, 9
O'Hare v. *Global Natural Res., Inc.*, 898 F.2d 1015 (5th Cir. 1990)..... 10
Runyon v. *National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) 9, 10
Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176 (1982)..... 6

TABLE OF AUTHORITIES – continued

Page

Tony & Susan Alamo Found. v. *Secretary of Labor*, 471 U.S. 290 (1985) 9

Vines v. *University of La.*, 398 F.3d 700 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006) 1, 3, 4, 8

Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 7

STATUTES

28 U.S.C. § 1292(b) 7

29 U.S.C. § 621(b) 3

§ 626 ..... 8, 9, 10

SCHOLARLY AUTHORITY

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 2, 6, 7

REPLY BRIEF

In its Petition, Sidley Austin LLP ("Sidley") demonstrated that the decision below implicated a conflict among the courts of appeals on the issue whether conduct by individuals that bars them from seeking relief under the federal anti-discrimination laws bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf. Pet. 13-20. Sidley showed that this is an important and recurring issue of law, *id.* at 20-23, and that, in resolving that question, the Seventh Circuit misread this Court's decision in *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279 (2002). Pet. 23-26. None of the EEOC's arguments undermines these showings or the need for certiorari.

First, the EEOC's claim that the decision below "does not conflict with the decision of any other court of appeals" is unsupportable. Opp. 6. The Seventh Circuit's ruling that the EEOC could proceed with claims for individual relief turns on its holding – what it called the "doctrinal heart of *Waffle House*" – that "the EEOC is not in privity with the victims for whom it seeks relief." Pet App. 3a. In direct conflict, the Fifth and Third Circuits have prevented age-discrimination claims from proceeding because those courts held that the EEOC is "in privity with individuals for whom it seeks relief." *Vines* v. *University of La.*, 398 F.3d 700, 708 (5th Cir 2005), *cert. denied*, 126 S. Ct. 1019 (2006); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (same).

The EEOC ignores this direct conflict on the core issue of "privity." If the Fifth or Third Circuits had adopted the Seventh Circuit's rule that the "EEOC is not in privity with the victims for whom it seeks relief," Pet. App. 3a, then *Vines* and *U.S. Steel* would have been decided differently. *Vines*, 398 F.3d at 706 (appeal "hinges on whether EEOC was in privity with Vines"); *U.S. Steel*, 921 F.2d at 493 ("The issue we must consider . . . is whether the private plaintiffs and the Commission are in privity."). Conversely, if the Seventh Circuit had agreed with *Vines* and *U.S. Steel* that the EEOC is

in "privity" with the individuals on whose behalf it seeks relief, then summary judgment would have been granted because the Seventh Circuit previously resolved the "identical question" by barring the EEOC from seeking individual relief. Pet. App. 2a (citing *EEOC* v. *North Gibson Sch. Corp.*, 266 F.3d 607 (7th Cir. 2001)). Indeed, the reason that the court below rejected *North Gibson* was its view that, under *Waffle House*, "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. In short, different circuits are applying fundamentally different rules of law that are outcome determinative. That situation cries out for this Court's review.

Second, the EEOC's suggestion that "[t]he interlocutory nature of the ruling provides a sufficient basis to deny review" is pure makeweight. Opp. 6-7. In *Waffle House*, the EEOC itself sought (and was granted) review of an interlocutory court of appeals decision because it involved a circuit conflict over the scope of the EEOC's enforcement authority under the federal anti-discrimination laws. 534 U.S. at 285. Countless decisions of this Court confirm that "the interlocutory status of the case" is no bar to certiorari where, as here, "the court below has decided an important issue, otherwise worthy of review," and where review by this Court "may serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002) (citing cases).

Here, the district court and court of appeals both properly concluded that (i) the question presented is one that is "important . . . for a broad range of institutions beyond the one which is litigating here" and (ii) immediate resolution of that issue would "speed up the litigation." Pet App. 14a-15a (district court); *id.* at 2a (court of appeals; district court order "satisfies . . . 28 U.S.C. § 1292(b)"). And, as the Chamber of Commerce of the United States makes clear, uniformity on this issue is of critical importance to businesses and workers nationwide. *See* Brief of the Chamber of Commerce of the

United States of America as *Amicus Curiae* at 2-3, 4-15 (July 21, 2006). The time to resolve the issue presented is now.

Finally, the EEOC's merits-based arguments, Opp. 6, 8-10, provide no basis for declining to resolve this circuit conflict. To the contrary, the EEOC's selective analysis of the Age Discrimination in Employment Act's ("ADEA's") statutory scheme underscores that the decision below utterly ignored the statutory text. Further, this belated effort to provide support for the decision below – culminating in the EEOC's startling conclusion that a final judgment against the EEOC "does not bar an individual from litigating his own ADEA claim," *id.* at 12 n.2 – has been rejected by the Fifth and Third Circuits. Likewise, the EEOC's analysis finds no support in *Waffle House* or any other decision of this Court. Indeed, the EEOC's view that it can seek individual relief for persons who, for "legitimate reasons," have decided not "to file charges," *id.* at 9, would cripple efforts by private parties to settle such disputes without EEOC involvement and thereby undermine the ADEA's goal of "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment," 29 U.S.C. § 621(b).

ARGUMENT

I. THIS CASE SQUARELY IMPLICATES A CONFLICT AMONG THE CIRCUIT COURTS ON A RECURRING AND IMPORTANT ISSUE.

1. Contrary to the EEOC's arguments, this case squarely implicates an outcome determinative conflict among the courts of appeals. In *Vines*, the Fifth Circuit explained that its decision whether to foreclose plaintiffs from proceeding with claims for individual relief "hinges on whether the EEOC was in privity with [the individual plaintiffs]." 398 F.3d at 706. Based upon a review of the ADEA's statutory text, the *Vines* court held that "[w]hen the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that plac[e] it in privity with those

individuals." *Id.* at 707. In *U.S. Steel*, the court explained that the dispositive issue was "whether the private plaintiffs and the Commission are in privity." 921 F.2d at 493. On that issue, the Third Circuit held that the language and structure of the ADEA refuted the EEOC's position that it "is not in privity with individuals on whose behalf it maintains ADEA actions." *Id.* at 496; *id.* at 495 ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable"). In direct conflict, the Seventh Circuit here ruled that the EEOC could proceed with its claims because "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a.

Resolution of this conflict controls the outcome in these cases. The *Vines* and *U.S. Steel* courts precluded further litigation to obtain individual-specific relief based on their conclusions that the EEOC is in privity with the individuals on whose behalf it seeks relief. *Vines*, 398 F.3d at 706-08; *U.S. Steel*, 921 F.2d at 496.[1] As such, the rulings in *Vines* and *U.S. Steel* would have been completely different if the Fifth or Third Circuits had agreed with the Seventh Circuit on the issue of privity. Pet. App. 3a.

Likewise, the court below recognized that its prior decision in *North Gibson* would have foreclosed the EEOC's claim for individual relief if that decision were unaffected by *Waffle House*, as Sidley argued below and here. Pet. App. 2a. The court below ruled, however, that *North Gibson* had been "scuttled" by *Waffle House* on the issue of privity. *Id.* at 2a, 3a. Thus, if the court below had applied the law set forth in *Vines* and *U.S. Steel*, it would have followed *North Gibson* and foreclosed the EEOC's claims for individual relief.

---

[1] Although the EEOC's brief omits any mention of "privity," the United States last year told this Court that *Vines* was wrong because the Fifth Circuit improperly concluded that "the EEOC is in privity with an individual when it seeks recovery for that individual." Brief for United States as *Amicus Curiae* at 8, *Vines*, No. 04-1615 (U.S. Dec. 2005).

The EEOC insists that there is no conflict because there "has been no prior action involving the claims raised by the EEOC in this case." Opp. 11. The Seventh Circuit itself has rejected that purported distinction, explaining that the EEOC cannot seek recovery on behalf of individuals who fail to file charges because (i) if any of these individuals had initiated a lawsuit, it would have been dismissed for "failure to comply with the statutory filing requirement," *North Gibson*, 266 F.3d at 616, and (ii) then the prohibition "on the EEOC's subsequent relitigation of the same claims would apply squarely," *id.* at 617. The decision below did not disturb that analysis, but instead disagreed with *North Gibson*'s antecedent ruling that "the EEOC is in privity" with the individuals for whom it seeks "monetary relief." *Id.* at 616.

Finally, the EEOC argues that there is no conflict with *Vines* and *U.S. Steel* because the decision below "left open the possibility that collateral estoppel would bar an individual who sues and loses from obtaining relief in an EEOC action." Opp. 12. That suggestion is illusory. Governing precedent dictates that collateral estoppel *requires* a showing of privity. *E.g.*, *Haring* v. *Prosise*, 462 U.S. 306, 317 n.10 (1983) ("collateral estoppel may only be asserted by persons who were either a party or privy to the prior action"); *Kraushaar* v. *Flanigan*, 45 F.3d 1040, 1050 (7th Cir. 1995) ("collateral estoppel can be used to bind only those persons who were parties or who are in privity with parties to the prior proceeding"). Consistent with this settled law, the EEOC's position is that "a judgment against the EEOC does not bar an individual from litigating his own ADEA claim." Opp. 12 n.2.

2. The EEOC also highlights a series of other circuit decisions in support of the unremarkable proposition that "the failure of an individual to file a charge does not preclude the EEOC from filing suit." Opp. 10. That argument is irrelevant because Sidley does not contend that "the failure of the 32 individuals to file charges under the ADEA prevents the EEOC from seeking injunctive relief." Pet. 9. The issue here

is whether conduct of individuals can preclude the EEOC from recovering *individual* relief on their behalf.

On that question, the cases cited by the EEOC say nothing. In *EEOC* v. *Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), the court dealt only with the district court's grant of injunctive relief, and remanded the case to consider "what additional relief, if any," might be appropriate. *Id.* at 1542-43. Likewise, *EEOC* v. *American & Efird Mills, Inc.*, 964 F.2d 300, 302 (4th Cir. 1992), and *EEOC* v. *Tire Kingdom, Inc.*, 80 F.3d 449, 451 (11th Cir. 1996) (per curiam), addressed whether the EEOC could *investigate* absent an employee charge, not whether the EEOC could obtain individual-specific relief on behalf of individuals who were barred from obtaining such relief for themselves. These cases cast no doubt on the clear conflict among the circuits on the question presented in this case.

II. THE PROCEDURAL POSTURE OF THIS CASE IS NO BAR TO REVIEW.

The EEOC is mistaken in arguing that "the interlocutory nature of the ruling provides a sufficient basis to deny review." Opp. 6. This Court regularly grants review of cases that are interlocutory. What is particularly ironic is that, in *Waffle House*, this Court granted the EEOC's petition for review of an interlocutory ruling that implicated a circuit conflict on the question whether an agreement to arbitrate between an employee and employer prevented the EEOC from seeking individual relief on behalf of the employee under the Americans With Disabilities Act ("ADA"). 534 U.S. at 285. The interlocutory posture of a decision simply is no "impediment to certiorari" where the court of appeals "has decided an important issue, otherwise worthy of review" and where final resolution of that issue "may serve to hasten or finally resolve the litigation." Stern, *supra* § 4.18, at 260.[2]

---

[2] *E.g.*, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176 (1982) (Title VII); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (ADEA); *General*

Here, the issue presented – whether the conduct of individuals can bar the EEOC from seeking individual relief on their behalf – is an important and recurring issue of federal law that warrants this Court's review. That issue has generated a conflict among the courts of appeals of the sort that warranted review in *Waffle House* and myriad other cases. Further, resolution of this issue "may serve to hasten or finally resolve the litigation." *Id.* Confining the scope of this case to the EEOC's claim for injunctive relief (i) would limit the need for discovery of sensitive information relating to the former law partners whose claims are at issue here, and (ii) would increase the potential for settlement. Indeed, both the district court and Seventh Circuit agreed that immediate review "may materially advance the ultimate termination of the litigation" when they certified this appeal under 28 U.S.C. § 1292(b). Pet. App. 2a, 15a; see Stern, *supra*, § 4.19, at 261 (noting relationship between interlocutory appeal under § 1292(b) and criteria for granting certiorari).

III. THE EEOC'S ARGUMENTS CONCERNING THE MERITS CONFIRM THE NEED FOR REVIEW.

The EEOC's discussion of its view of how this case should be decided, Opp. 8-10, provides no basis for denying review. Rather, the EEOC's analysis confirms that the circuit conflict is intractable, misapprehends this Court's decisions, and, if accepted, would thwart the goals of the ADEA by undermining the ability to resolve disputes voluntarily.

1. The EEOC's statutory arguments underscore that the Seventh Circuit's decision utterly ignored the ADEA's statutory text. Pet. App. 2a-3a (relying exclusively on *Waffle*

Tel. Co. of the Nw., Inc. v. *EEOC*, 446 U.S. 318 (1980) (Title VII); *Lorillard* v. *Pons*, 434 U.S. 575, 577 (1978) (ADEA). None of the cases relied upon by the EEOC, Opp. 6-7, is remotely similar to this case. *E.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (equal protection); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam) (arbitration); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) (trademark).

House, an ADA case). The EEOC attempts to fill that void, albeit selectively, by arguing that subsections (a), (b) and (d) of 29 U.S.C. § 626 allow the EEOC "to determine whether it is in the public interest to seek relief" even if the former law partners in this case may have "legitimate reasons" for declining to file charges. Opp. 8-9.[3]

Absent from the EEOC's analysis is any discussion of subsection (c), which directs that "the right of any person to bring such actions shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under [the Act]." 29 U.S.C. § 626(c)(1). In *U.S. Steel*, then-Judge Alito analyzed § 626(c) and explained that

> Congress would not have crafted this enforcement scheme – on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action – unless Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights.

921 F.2d at 494-95. Likewise, in *Vines*, the Fifth Circuit followed *U.S. Steel* to conclude that the ADEA's "statutory enforcement mechanism" "places the EEOC in privity with individuals for whom it seeks relief." 398 F.3d at 708. Neither the EEOC nor the Seventh Circuit has made any effort to square their position that the "EEOC is not in privity with the individuals for whom its seeks relief" with conflicting decisions that actually analyze the ADEA's text.

---

[3] The EEOC challenges the Question Presented, arguing, *inter alia*, that the decision below addressed the EEOC's ability to "'obtain monetary relief'" under the ADEA, whereas the question presented encompasses the "'more general question'" of the EEOC's authority "'under the federal antidiscrimination laws.'" Opp. 12. That criticism is unfair. The Seventh Circuit's decision in this ADEA case (Pet. App. 2a-3a) was based on its reading of *Waffle House*, which involved a claim under the ADA, and *Waffle House* itself relied on cases interpreting Title VII, yet another federal antidiscrimination statute. 534 U.S. at 285-88.

2. Nor is the ruling below supported by this Court's decisions. Opp. 9-10. *Waffle House* expressly provides that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court," 534 U.S. at 296, and explains that "ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims," *id.* at 298. This Court's acknowledgement that the EEOC's ability to recover is not *in all* cases "merely derivative" of the rights of private individuals, *id.* at 297, is a far cry from the categorical ruling by the court below that *Waffle House* holds that EEOC "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole." Pet. App. 2a.

Likewise, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985), does not support the EEOC. The *Alamo* Court held that the minimum wage and overtime requirements of the Fair Labor Standards Act ("FLSA") apply even where affected persons testified that they were volunteers rather than employees. *Id.* at 302. The Court explained that "the purposes of the [FLSA] require that it be applied even to those who would decline its protections" because otherwise "employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive protections under the [FLSA]." *Id.*

Alamo has no application here because the FLSA and ADEA differ in critical respects. Unlike the FLSA, which the *Alamo* Court explained prohibits waivers, *id.*, the ADEA expressly authorizes waivers by private parties. 29 U.S.C. § 626(f). Further, unlike the FLSA, "prior to the initiation of any ADEA action, an individual must give notice to the [EEOC]" by filing a timely charge. *Lorillard* v. *Pons*, 434 U.S. 575, 579-80 (1978); *see also* 29 U.S.C. § 626(c).

Circuit courts likewise have held that *Alamo* is inapplicable to cases under the ADEA because "[t]he purposes behind enactment of the ADEA and . . . FLSA are . . . obviously different." *Runyon* v. *National Cash Register Corp.*, 787 F.2d

1039, 1043 & n.6 (6th Cir. 1986) (en banc); see *O'Hare* v. *Global Natural Res., Inc.*, 898 F.2d 1015, 1016-17 & n.1 (5th Cir. 1990); *Lancaster* v. *Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir. 1987). In particular, the FLSA "protects the lowest paid workers whereas the ADEA protects a different class of employees many of whom are 'highly paid and capable of securing legal assistance without difficulty.'" *O'Hare*, 898 F.32 at 1017 n.1 (quoting *Runyon*, 787 F.2d at 1043). That distinction is particularly apt in a case involving the EEOC's efforts to recover individual benefits on behalf of former law partners who chose to forgo their rights to file charges under the ADEA.

3. Lastly, the Seventh Circuit's acceptance of the EEOC's position that its right to recover against a defendant is independent of the "legal rights of individuals even when it is seeking to make them whole," Pet. App. 2a, utterly undermines the ADEA's goal of resolving disputes without the need for agency involvement. 29 U.S.C. § 626(f) (authorizing waiver of rights under the ADEA); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (ADEA reflects "flexible approach to resolution of claims," including settlement of disputes "without any EEOC involvement"); *Runyon*, 787 F.2d at 1043 (approving of "settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement"). As the Chamber of Commerce explains, if the EEOC's right to seek individual-specific relief is divorced from the rights of individuals who decline to file charges or otherwise settle their claims, then there will be little incentive for private parties to resolve their disputes voluntarily. See *Amicus Curiae* Chamber of Commerce, at 13-14.

CONCLUSION

For these reasons, and those set forth in the Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY M. ELDEN
JOHN E. BUCHEIT
GRIPPO & ELDEN LLC
111 S. Wacker Drive
Chicago, IL 60606
(312) 704-7700

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
ILEANA M. CIOBANU
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 1, 2006

FILED
JUL 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 05-1481

IN THE

Supreme Court of the United States

SIDLEY AUSTIN LLP,

Petitioner,

v.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NOEL J. FRANCISCO
(Counsel of Record)
DONALD EARL CHILDRESS III
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a not-for-profit corporation that has neither a parent nor stockholders.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE DECISION BELOW WILL UNDERMINE THE ABILITY OF BUSINESSES IN NUMEROUS INDUSTRIES TO AMICABLY RESOLVE LITIGATION THROUGH SETTLEMENT NEGOTIATIONS 4

II. THE SEVENTH CIRCUIT'S DECISION THWARTS A CONGRESSIONAL SCHEME DESIGNED TO ENCOURAGE SETTLEMENT OF DISPUTES AND CESSATION OF LITIGATION 15

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

In re Bemis Co., Inc., 279 F.3d 419 (7th Cir. 2002) 14
Carson v. American Brands, Inc., 450 U.S. 79 (1981) 16
EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539 (9th Cir. 1987) 2
EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) 2
EEOC v. Northlake Foods, Inc., 411 F. Supp. 2d 1366 (M.D. Fla. 2005) 10
EEOC v. United States Steel Corp., 921 F.2d 489 (3d Cir. 1990) 2
EEOC v. W.H. Braum, Inc., 347 F.3d 1192 (10th Cir. 2003) 2
EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) ..... *passim*
General Dynamics Land System, Inc. v. Cline, 540 U.S. 581 (2004) 1
Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) 1
Senich v. American-Republican, Inc., 215 F.R.D. 40 (D. Conn. 2003) 8, 9
Shikles v. Sprint/United Management Co., 426 F.3d 1304 (10th Cir. 2005) 1
Vines v. University of Louisiana, 398 F.3d 700 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006) 2

Federal Statutes

29 U.S.C. § 621(b) 16
29 U.S.C. § 626(b) 3, 16
29 U.S.C. § 626(d) 16
42 U.S.C. § 1981a 4
42 U.S.C. § 2000e-5(a) 14
42 U.S.C. § 12117(a) 4, 14

TABLE OF AUTHORITIES
(continued)

Page

Miscellaneous

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (6th ed. 2003) 12

Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994) 12

Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589 (2005) 11

Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?*, 9 TEMP. POL. & CIV. RTS. L. REV. 345 (2000) 13, 14

Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535 (1990) 11

David M. Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) 14

Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165 (1997) 12

TABLE OF AUTHORITIES

(continued)

Page

U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Non-waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 1997), *available at* http://www.eeoc.gov/policy/docs/waiver.html 7, 9

U.S. Equal Employment Opportunity Commission, Charge Statistics: FY 1992 Through FY 2005, *available at* http://www.eeoc.gov/stats/charges.html 15

U.S. Equal Employment Opportunity Commission, Federal Equal Opportunity (EEO) Laws, *available at* http://www.eeoc.gov/abouteeo/overview_laws.html 14

ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 159 tbl.C-2 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html 15

ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 183 tbl.C-4 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html 15

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations, with direct members of every size in every industrial sector and geographic region of the country. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court and the federal courts of appeals that have raised issues of vital concern to the Nation's businesses, including several cases that have addressed federal anti-discrimination laws and the United States Equal Employment Opportunity Commission. *See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304 (10th Cir. 2005).

The Chamber has long been a strong advocate of national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient business operations, especially in the area of employer/employee relations, and protects businesses against the costs and risks of navigating a maze of inconsistent federal laws.

The question presented in this case—namely, whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the Equal Employment Opportunity Commission ("EEOC") from obtaining individual relief on their behalf—directly implicates the Chamber's interest in a

predictable and uniform federal legal scheme. Because the Seventh Circuit's decision, which is in conflict with decisions of other courts of appeals, *see Vines v. Univ. of La.*, 398 F.3d 700, 707 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1019 (2006); *EEOC v. W.H. Braum, Inc.*, 347 F.3d 1192, 1201-02 (10th Cir. 2003); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 496-97 (3d Cir. 1990) (Alito, J.); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987); *EEOC v. McLean Trucking Co.*, 525 F.2d 1007, 1011 (6th Cir. 1975), will have far-reaching and disastrous implications for countless businesses that depend upon the certainty, predictability, and uniformity of federal law, the Chamber and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.[1]

SUMMARY OF ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are clearly present here: The decision below implicates a well-developed split among the federal courts of appeals concerning an important and recurring question of federal law. But, *amicus* wishes to highlight additional reasons why it is important for this Court to grant certiorari, and to grant it now.

This case poses the important question whether conduct by individuals that bars them from obtaining individual relief under the federal anti-discrimination laws similarly bars the EEOC from obtaining individual relief on their behalf. Specifically, the question before this Court is whether the EEOC may recover individual-specific relief under federal anti-discrimination laws, where, as here, no individual or

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief, and their consent letters are on file with the Clerk's Office.

entity filed a timely charge of discrimination. The court below, plainly misapprehending and vastly expanding this Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), held that the EEOC's right to seek recovery on behalf of individuals is in no way "derivative of the legal rights of [those] individuals even when it is seeking to make them whole." Pet. App. 2a. In reaching this conclusion, the Seventh Circuit averred that "the doctrinal heart of *Waffle House*" is that "the EEOC is not in privity with the victims for whom it seeks relief." Pet. App. 3a. As such, the lower court found that an individual's "procedural forfeiture"—a failure to exhaust remedies in this case—does not bar the EEOC from pursuing his case, because "the *Commission* had no duty to exhaust." Pet. App. 2a. Thus, the court below held that the EEOC could seek individual relief on behalf of a group of lawyers who chose never to file charges with the EEOC, even though the lawyers themselves would be barred from seeking such relief on their own behalf. *Id.*

The Seventh Circuit's erroneous and expansive reading of *Waffle House*, coupled with the EEOC's sweeping assertion of limitless enforcement authority, will undermine the ability of countless businesses to amicably resolve litigation through well-established settlement policies. Should the decision below stand, employers and employees will be stripped of their expectation interest in finality achieved through settlement agreements or other judgments. Furthermore, the Seventh Circuit's misguided conclusion that the EEOC is never "in privity with the victims for whom it seeks relief," Pet. App. 3a, will undermine the explicit purpose of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), to facilitate the informal settlement of age discrimination claims between employers and employees without resort to litigation.

Because the decision below will frustrate the settlement practices of numerous businesses, this Court should grant review to define precisely the scope of *Waffle House* and to prevent the inevitable uncertainty and harm that businesses will suffer should the Seventh Circuit's holding stand.

ARGUMENT

I. THE DECISION BELOW WILL UNDERMINE THE ABILITY OF BUSINESSES IN NUMEROUS INDUSTRIES TO AMICABLY RESOLVE LITIGATION THROUGH SETTLEMENT NEGOTIATIONS

Review of the Seventh Circuit's decision is essential. Without this Court's immediate intervention, the expansive interpretation of *Waffle House* advocated by the EEOC and adopted by the Seventh Circuit will adversely affect the national business environment by undermining the certainty and finality that is essential to the fair and expeditious resolution of employment discrimination claims.

1. In *Waffle House*, this Court held that an agreement between an employer and an employee to arbitrate an employment-related dispute in a particular arbitral forum did not bar the EEOC from pursuing individual-specific judicial relief, such as backpay, reinstatement, and damages, in a federal court enforcement action brought pursuant to § 107(a) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. 534 U.S. at 283-98. The Court reached this conclusion because nothing in the Federal Arbitration Act ("FAA")—which governed the dispute between the parties—authorizes a court to compel the arbitration of any issues, or by any parties, that are not covered in the agreement. *Id.* at 289. Since the EEOC was not a party to the arbitration agreement at issue in *Waffle House*, this Court held that the EEOC was not barred by the parties' agreement from pursuing individual-specific relief in federal court. *Id.* at 297-98.

The limited nature of this Court's holding in *Waffle House* is plain, and *Waffle House*'s inapplicability to the present dispute is evident in this Court's specific admonition that

> no question concerning the validity of [the employee's] claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum is presented by this record. . . . *It is an open question* whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek.

Id. at 297 (emphasis added).

Given the Court's acknowledgment that an individual's "conduct may have the effect of limiting the relief that the EEOC may obtain in court," *id.* at 296, *Waffle House* simply cannot be read as affirmatively holding that the EEOC is *never* in privity with individuals on whose behalf it seeks relief. Rather, *Waffle House* decided that where an employee enters into a contract selecting the *forum* for suit, then, in those cases, the EEOC is not *contractually bound* by that choice of forum and may pursue individual-specific claims in federal court. *See id.* at 295 (stating that because the EEOC vindicates the public interest even when it seeks victim-specific relief, "the EEOC has the authority to pursue victim-specific relief regardless of the *forum* that the employer and employee have chosen to resolve their disputes") (emphasis added); *see also id.* at 298 (stating that "the statute specifically grants the EEOC exclusive authority over the choice of *forum* and the prayer for relief once a charge has been filed") (emphasis added).

In other words, the only question before this Court in *Waffle House* was whether an employee's *choice of an arbitral forum* for litigating his *private* claims was contractually binding on the EEOC when it seeks

individual-specific relief in a public enforcement action.[2] *Waffle House* thus reserved the general question of whether the EEOC can obtain relief on behalf of individuals that would be barred if sought by the individuals themselves. *Id.* at 297-98.

2. The Seventh Circuit has, at the EEOC's urging, adopted an erroneous and expansive reading of *Waffle House*. According to the Seventh Circuit, "the Commission was not bound by [the arbitration clause at issue in *Waffle House*] because its enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole," and, therefore, "the Commission is not bound by the failure of the Sidley ex-partners to exhaust their remedies; the *Commission* had no duty to exhaust." Pet. App. 2a. The Seventh Circuit thus believed that the "doctrinal heart of *Waffle House*" was that the EEOC is

---

[2] Even the EEOC acknowledged this understanding of the case:

> This case *does not present* any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action. The availability of relief in such cases would require resolution of questions concerning whether victim-specific relief would result in a double recovery, whether victim-specific relief is 'appropriate' under 42 U.S.C. 2000e-5(g)(1) after the victim has satisfied his own claim through litigation or settlement, and whether principles of res judicata would bar an award of victim-specific relief under a particular statutory scheme and set of facts. . . . In this case, [the employee] has neither litigated nor settled his individual claim. Accordingly, the question presented is *not* one of res judicata or mootness, but rather whether [the employee's] mere *choice of an arbitral forum* for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action.

Brief for the Petitioner at 38 n.13, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (No. 99-1823) (emphases added). In sum, not even the EEOC believed that the Court in *Waffle House* was speaking to the issue now presented in this case.

never "in privity with the victims for whom it seeks relief," Pet. App. 3a, and that *Waffle House* therefore "scuttled" existing caselaw on this general issue, Pet. App. 2a.

3. The Seventh Circuit's erroneous and expansive reading of *Waffle House* has far-reaching implications for businesses in numerous industries. Indeed, in light of the EEOC's effort to use *Waffle House* to vastly expand its regulatory reach, it is clear that the Seventh Circuit's broad holding will undermine the ability of businesses and employees to reach amicable resolutions in thousands of employment discrimination claims.

Before *Waffle House*, the EEOC made clear that in cases where "an individual[,] who has signed a waiver agreement or otherwise settled a claim[,] subsequently files a charge with the Commission based on the same claim, the employer *will be shielded* against any further recovery . . . whether the EEOC *or* the private individual brings a subsequent action." U.S. Equal Employment Opportunity Comm'n, Enforcement Guidance on Non-waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 199) ("EEOC Enforcement Guidance"), *available at* http://www.eeoc.gov/policy/docs/waiver.html (last visited July 20, 2006) (emphases added). As the EEOC explained to this Court, the "courts of appeals have relied on principles of res judicata (in litigated or arbitrated cases) or mootness (in settled cases) to bar the EEOC from obtaining victim-specific relief after litigation or settlement of the victim's claims." Brief for the Petitioner at 38 n.13, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (No. 99-1823). In *Waffle House*, the EEOC thus specifically told this Court that "[t]his case *does not* present any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action." *Id.* (emphasis added). In short, both before and during *Waffle House*, the EEOC acknowledged that it was in privity with the individuals for whom it seeks relief in those cases where the conduct of individuals barred them from

obtaining relief, including cases where individual claims had been previously litigated or settled.

Since *Waffle House*, however, the EEOC has reversed course, taking the position that it is not bound *in any way* by the conduct of individuals for whose benefit it seeks individual relief. In doing so, the EEOC has begun to use *Waffle House* for a proposition that it initially conceded was not even an issue in the case. *See id.* ("This case *does not present* any question regarding the effect of a prior private settlement or judgment between employer and employee on a later public enforcement action.") (emphasis added). In other words, the EEOC now cites *Waffle House* for the proposition that an employee's prior conduct, whether involving a settlement, waiver, or default of claims, has *no bearing* on a subsequent enforcement action by the EEOC. *See* Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 7, *EEOC v. Sidley Austin Brown & Wood LLP*, 406 F. Supp. 2d 991 (N.D. Ill. Dec. 20, 2005) (No. 05 cv 0208) (arguing that *Waffle House* established that "the EEOC can seek victim-specific relief even if the individual victims are barred from seeking relief on their own behalf").

In fact, this has become the EEOC's standard position in litigation. In *Senich v. American-Republican, Inc.*, for example, the question before the court was whether the EEOC could seek individual-specific relief under the ADEA for five individuals who each had signed a waiver and release in exchange for receiving severance payments. 215 F.R.D. 40, 42 (D. Conn. 2003). The EEOC argued that the waivers did not preclude it from seeking such relief. *See id.* Although it did not dispute that the line of cases prior to *Waffle House* would have barred it from pursuing victim-specific remedies on behalf of these employees, the EEOC contended that the *Waffle House* decision "undermine[d] the reasoning" applied in those cases. *Id.* (internal quotation marks omitted). As such, it invited the *Senich* court to "find

that *Waffle House* [was] applicable to cases, such as this, where an employee signs a waiver or release." *Id.* at 44.

The EEOC's reading of *Waffle House* in *Senich* thus represented a clear departure from its pre-*Waffle House* belief that in cases where "an individual . . . has signed a waiver agreement or otherwise settled a claim . . . the employer will be shielded against any further recovery," EEOC Enforcement Guidance, *available at* http://www.eeoc.gov/policy/docs/waiver.html (last visited July 20, 2006), and its representation to this Court in *Waffle House* that "the question presented is not one of res judicata or mootness, but rather whether [the employee's] mere choice of an arbitral forum for litigating his private claims is binding on the EEOC when it seeks victim-specific relief in a public enforcement action," Brief for the Petitioner at 38 n.13, *Waffle House*, 534 U.S. 279 (No. 99-1823). Unlike the arbitration agreement in *Waffle House*, the waiver in *Senich* did not involve a choice of forum. On the contrary, the waiver merely foreclosed further action against the employer in exchange for a severance package. *Senich*, 215 F.R.D. at 42. By arguing that *Waffle House* was applicable, not only to arbitration agreements but to waivers as well, the EEOC thereby sought to enlarge the scope of the holding in *Waffle House* well beyond the limited question presented to and addressed by this Court.

The EEOC is now seeking to go even further. In this case, the EEOC argues that it may obtain monetary relief under the ADEA on behalf of individuals who defaulted on their claims by not filing a charge of discrimination at all. This is so because, according to the EEOC, its right to recover in no way depends on the legal rights of the individuals for whom it seeks relief. *See* Brief in Opposition to Defendant's Motion for Partial Summary Judgment at 7, *Sidley Austin*, 406 F. Supp. 2d 991 (No. 05 cv 0208) ("[T]he EEOC can seek victim-specific relief even if the individual victims are barred from seeking relief on their own behalf."). Given the EEOC's expansive interpretation of its own statutory

powers, cases like the one at bar will continue to arise until this Court clearly confirms its precise holding in *Waffle House* and affirmatively establishes whether and in what circumstances the EEOC may obtain individual-specific relief for individuals who themselves have no claims at law.

This Court's review is particularly necessary given that this is not an isolated case of EEOC action. *See EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1367 (M.D. Fla. 2005) (noting that the EEOC refused to dismiss its individual-specific claims until the defendant agreed to disclose the settlement amount). Rather, it is part and parcel of a campaign by the EEOC to arrogate to itself the power to litigate on behalf of individuals without regard to their conduct or legal rights, thereby effectively undoing voluntary settlements to which the directly interested parties have expressly agreed. Neither the ADEA, nor this Court's caselaw, nor common sense supports the EEOC's position. This Court's review is thus essential to stem the tide of uncertainty that threatens to engulf both courts and businesses as the EEOC continues to push for an expansive reading of *Waffle House*.

4. Without this Court's immediate intervention, the far-reaching interpretation of *Waffle House* advocated by the EEOC and adopted by the Seventh Circuit will adversely affect the national business environment by injecting greater uncertainty into business decisionmaking. Most notably, if the Seventh Circuit's holding stands, then businesses will no longer be able to settle disputes with the necessary certainty that the underlying claim will be put to rest. Indeed, to the extent that the EEOC is not "in privity with the victims for whom it seeks relief," Pet. App. 3a, any settlement agreement between a business and an aggrieved individual will merely be a precatory cessation of litigation, since the EEOC could simply resume litigation on behalf of the individual at any time. Such a perverse approach would "allow the EEOC to reduce [a settlement] agreement to all

but a nullity." *See Waffle House*, 534 U.S. at 309 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, J.).

In holding that the EEOC's right to recover in no way depends on the legal rights of the individuals for whom it seeks relief, the Seventh Circuit's decision also effectively strips employers of their expectation interest in finality achieved through settlement agreements. "Where there is reason to believe the settlement would not preclude any later litigation, the defendant's incentive to settle may be severely undercut." Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 615 n.112 (2005). In other words, "[b]ecause settling defendants typically seek to put the entire litigation behind them once and for all, they will have less incentive to settle if they know that they may still be held liable for extensive litigation fees caused by possible [future] challenges." Jean R. Sternlight, *The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs*, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 606 (1990). This lack of finality will therefore discourage the speedy and predictable settlement of discrimination cases by removing an important incentive to settle a case—that is, the incentive to foreclose any further litigation.

Indeed, this was the problem that some members of this Court highlighted in *Waffle House* itself. *See Waffle House*, 534 U.S. at 312 (Thomas, J., dissenting, joined by Rehnquist, C.J., Scalia, J.) (arguing that the EEOC's ability to seek individual-specific relief on behalf of employees who have already settled their claims "would discourage employers from entering into settlement agreements and thus frustrate Congress' desire to expedite relief for victims of discrimination"). And it was to foreclose this objection that this Court made clear that it was *not* addressing the "question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Id.* at 297. The problem that this Court attempted to avoid, however, will only grow more

troublesome unless and until this Court confirms *Waffle House*'s precise holding.

a. *First*, by impeding the settlement process, the Seventh Circuit's decision, if left undisturbed, will dramatically decrease employers' willingness to settle employment discrimination claims, which will, in turn, produce greater litigation expenses, more unpredictability, less privacy, and lower employee morale. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1350-51 (1994) (listing a number of benefits ranging from party satisfaction to cost-savings that result from settlement agreements); *see also* Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOT. L. REV. 165, 168-72 (1997) (discussing the benefits for both parties of a negotiated settlement in the employment discrimination context).

Prior to the Seventh Circuit's decision, the threat of multiple exposure to individual-specific liability was not even a consideration in settlement decisions. Under the Seventh Circuit and EEOC's view of *Waffle House*, however, businesses must now consider this threat in *all* settlement situations. This, then, dramatically increases the very uncertainty that settlements aim to eliminate—the uncertainty of future litigation costs and potential damage awards. The Seventh Circuit and EEOC's rationale also increases the costs of settlement more generally, because under it businesses must expend more time and resources to gather and process information concerning which claims they should settle and how they should settle those claims. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17 (6th ed. 2003) (explaining that information costs are divided into two categories—the cost of acquiring information and the cost of absorbing or processing information). For instance, based on the size of the claim, the complexity of the legal issues, the potential merit of the claim, and the

perceived likelihood of post-settlement intervention by the EEOC, a business could elect not to settle, or it could offer a lower settlement payout in anticipation of subsequent EEOC litigation. Each option presents different costs and benefits for which the business must now acquire additional information in order to make a sound settlement decision.

Nor does the fact that the EEOC ultimately will file suit in a relatively small percentage of cases undermine the impact that the Seventh Circuit and EEOC's view will have on settlements. *Ex ante*, no employer will know whether or not its settlement will later be scuttled by a separate EEOC suit seeking recovery of individual-specific relief. Perhaps more importantly, settlement is the most useful option for the subset of claims that may have merit or for which the merit is uncertain. This, however, is precisely the class of claims for which EEOC intervention is the most likely. Thus, the impact of this erroneous and expansive understanding of *Waffle House* will indeed be substantial and recurring.

In short, if allowed to stand, the Seventh Circuit and EEOC's broad interpretation of *Waffle House* will greatly increase the cost of and uncertainty surrounding settlements and, concomitantly, will reduce an employer's incentive to settle. This will in turn undermine the very structure of the federal anti-discrimination laws, which, as discussed further below, are specifically designed to *promote* the amicable resolution of employment discrimination claims.

b. *Second*, the Seventh Circuit's decision will have adverse consequences not only for countless businesses but also for aggrieved individuals who rely on settlements to obtain meaningful and timely relief without unnecessary expense and hardship. Employment discrimination claims "are time consuming, expensive to litigate, highly individualistic, and labor intensive. They are certain to draw vigorous defenses from experienced counsel for employers who often possess superior resources." Louis S. Rulli, *Employment Discrimination Litigation Under the ADA from*

the Perspective of the Poor: Can the Promise of Title I Be Fulfilled for Low-Income Workers in the Next Decade?, 9 TEMP. POL. & CIV. RTS. L. REV. 345, 381 (2000). Indeed, because comparatively few of these cases go to trial, "plaintiffs are most likely to achieve success through negotiated settlements." *Id.*; *see also id.* at 368-73 (examining all ADA Title I cases in the Eastern District of Pennsylvania from 1996 to 1998 and concluding that the win rate for plaintiffs in cases decided by judges or juries approximated only 2.7%, whereas 47% to 63% of the cases settled with some benefits to the plaintiffs); David M. Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 122 (1983) ("[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed."). By discouraging businesses from negotiating settlement agreements, the decision below threatens to deprive plaintiffs of the most cost-effective means of obtaining relief.

c. *Finally*, should the Seventh Circuit's decision stand, the impact on the business community as a whole cannot be overstated given that the decision below implicates virtually every federal employment discrimination dispute in the Nation.

The Seventh Circuit and EEOC's rationale is not limited to the ADEA, but rather, extends to other anti-discrimination statutes enforced by the EEOC, including Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(a), and Titles I and V of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12117(a).[3] *See In re Bemis Co.*, 279 F.3d 419, 422 (7th Cir. 2002) (applying *Waffle House* to an EEOC action under Title VII); *see also* Brief in Opposition to Defendant's Motion for Partial

[3] *See also* U.S. Equal Employment Opportunity Comm'n, Federal Equal Employment Opportunity (EEO) Laws, *available at* http://www.eeoc.gov/abouteeo/overview_laws.html (last visited July 20, 2006) (explaining various statutes enforced by the EEOC).

Summary Judgment at 9, *Sidley Austin*, 406 F. Supp. 2d 991 (No. 05 cv 0208) (arguing that *Waffle House* applies not only to the ADA but to both the ADEA and Title VII as well).

In light of this, the implications of the Seventh Circuit's ruling are staggering. In fiscal year 2005 alone, employees filed a total of 75,428 discrimination charges with the EEOC, the vast majority of which alleged discrimination prohibited by Title VII, the ADA, or the ADEA. *See* U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1992 Through FY 2005, http://www.eeoc.gov/stats/charges.html (last visited July 20, 2006). Employees filed 16,930 employment discrimination cases in federal district court during the same period. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 159 tbl.C-2 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html (last visited July 20, 2006). However, during 2005, only 3.5% of federal employment discrimination suits between private parties filed in federal district court ever made it to trial. ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 183 tbl.C-4 (2005), *available at* http://www.uscourts.gov/judbus2005/contents.html (last visited July 20, 2006). The impact of the decision below on the resolution of thousands of employment discrimination suits, therefore, simply cannot be discounted or ignored.

II. THE SEVENTH CIRCUIT'S DECISION THWARTS A CONGRESSIONAL SCHEME DESIGNED TO ENCOURAGE SETTLEMENT OF DISPUTES AND CESSATION OF LITIGATION

As reflected in these practical effects, the decision below also clearly thwarts a congressional scheme designed to encourage the prompt resolution of employment

discrimination claims. Because settlement is the preferred form of resolving employment discrimination disputes, this Court's review is also warranted to advance Congress's goal of "encouraging voluntary settlement of employment discrimination claims." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981).

Congress's stated purpose for the ADEA is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Settlement encourages that purpose. The statute thus requires that "[b]efore instituting any action under this section, the Equal Employment Opportunity Commission *shall* attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(b) (emphasis added); *see also id.* § 626(d) ("Upon receiving such a charge, the Commission . . . *shall* promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.") (emphasis added).

The plain implication of this regulatory regime is that the EEOC *cannot* and *should not* pursue litigation until it has first attempted to orchestrate a settlement through an informal conciliation process. For all of the reasons discussed, however, the rationale undergirding the Seventh Circuit's decision frustrates and discourages settlement. It thus contravenes the overarching statutory purpose of the ADEA "to help *employers and workers*," 29 U.S.C. § 621(b) (emphasis added), find their own way to resolve age discrimination disputes.

* * *

The decision below effectively strips employers and employees of their expectation interest in finality achieved through settlement agreements or other judgments. The reach of this decision, moreover, extends beyond the ADEA

to other federal employment discrimination laws enforced by the EEOC. Thus, the impact of the decision below upon the business community cannot be understated: The EEOC and Seventh Circuit's view of *Waffle House* threatens to undermine the very basis upon which thousands of federal anti-discrimination claims are resolved each and every year. Because the Seventh Circuit's rationale threatens to encumber businesses operating not only under the ADEA but under various other federal statutes and to thwart a carefully crafted congressional plan to encourage the prompt resolution of employment disputes, this Court's review is immediately warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

STEPHEN A. BOKAT
ROBIN S. CONRAD
SHANE BRENNAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NOEL J. FRANCISCO
(Counsel of Record)
DONALD EARL CHILDRESS III
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amicus Curiae

July 21, 2006